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The Meritocracy Myth and the Illusion of Equal Employment Opportunity

Anne Lawton[†]

[O]ur legal scheme against discrimination would be little more than a toothless tiger if the courts were to require . . . direct evidence of discrimination.

—*Marzano v. Computer Science Corp.*¹

Protections in law should be protections in fact.

—President Clinton²

Two years ago, I developed an exercise for my students, most of whom major in business, in the hope of creating classroom discussion about what the word “qualified” means in the context of employment decisions. I had been frustrated by the students’ beliefs that employers could select with accuracy the most qualified candidate for any particular position and that affirmative action worked to rob qualified white and male candidates of jobs. I figured that, with a well-written exercise, I could convince my students of the malleability and imprecision of hiring criteria and the fallacy that merit alone determines employment success.³

The exercise required students to act as members of a municipal hiring committee charged with choosing between John Williams and Cathy Jones, two white police officers, for a road officer position with the City, a suburban working class

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1. *Marzano v. Computer Science Corp.*, 91 F.3d 497, 507 (3d Cir. 1996).

2. *President Clinton on State of Union: “The Strongest It Has Ever Been,”* N.Y. TIMES, Jan. 28, 2000, at A16.

3. See *infra* Part I.C. (discussing the reality of workplace opportunity).

community of 200,000 residents.⁴ I deliberately designed the exercise so that Williams and Jones had different strengths, which often is the case in hiring and promotion decisions.⁵

To draw attention to the problems posed by subjective criteria, I included, as a hiring criterion, an interview by three male police officers, two of whom worked for the City and one who worked for a neighboring police department. The interview panel gave Williams a 49 out of 50 on his interview, and Jones a 42 out of 50. The panel felt that Jones knew the law very well, in particular the law on search and seizure, but it believed that Jones was "not aggressive enough" in her responses to some of the hypothetical situations posed.

I also included information about the City's affirmative action plan, which provided that the City could consider a candidate's race or sex in an employment decision when candidates were equally qualified. Finally, the exercise contained information about the number of women officers (10 out of 240) and evidence of both past and current sex discrimination within the police department.⁶

I fully expected that at least half of the students would select Jones for the police officer position. I was wrong. The majority of students believed that Williams clearly was the more qualified candidate, even when Jones had better objective

4. The exercise is loosely based on the experiences of Kathleen Lawton as a police officer for a large suburban police force.

5. See *infra* text accompanying notes 170-74. Williams had a college degree, had won several shooting contests and was an expert with handguns. His father was a twenty-year veteran on the police force. Jones had earned a college degree and a law degree, and had experience as a law student intern in the Juvenile Justice Division of the state's largest municipality.

Both Williams and Jones had road experience. I changed the length of that experience to determine whether the number of years worked on the road would alter students' perceptions of Williams's and Jones's qualifications. Even when Jones had more years of road experience than Williams, however, a majority of the class selected Williams as the more qualified candidate.

6. The exercise contained several pieces of evidence suggesting both past and present discrimination within the police department. First, in 1975 two women officers sued the City because the police department had a policy that forbade women from "working the road." (The phrase "working the road" means going out in a squad car to patrol the City.) Second, even though the City settled the lawsuit, few male officers currently ride with female partners because the men believe the women are not good "back up." Third, a number of female officers have complained about the "macho" attitudes of many male officers. Two of the ten female officers on the force have complained about sexual harassment on the job.

qualifications, such as more relevant education and more road experience.⁷

Few students saw any problem with the subjective nature of the interview. They took the interview "scores" at face value, believing they demonstrated some quantifiable quality about the candidates. A few students picked up on the phrase "not aggressive enough" as a sex-based stereotype, but many other students believed that phrase simply reflected the interview panel's accurate assessment of Jones's ability to analyze the hypothetical situations posed.

Moreover, the significant disparity in numbers of male versus female officers, the history of sex discrimination within the police department, and the attitudes of male officers toward female officers did not figure in most students' analyses. For example, few students questioned the interview scores based on the composition of the interview panel. For many of the

7. I have used this exercise in five different classes: four sections of an introductory business law course and one section of employment law. In four of the five classes, a majority of the class selected Williams as the more qualified candidate. Only one class, a section of the introductory business law course, selected Jones as the more qualified candidate. That occurred during the fall of 1999 when I altered the exercise so that Williams and Jones had equal years of road experience. When I changed the exercise again so that Jones had more years of road experience than Williams, a majority of the class still selected Williams as the more qualified candidate. Some students did so on the basis of the interview score, while others cited his facility with a handgun as an important factor in their decision.

The students' responses are consistent with the results of a research study on whether an applicant's sex and gender influence the applicant's desirability for particular occupations. See Patricia C. Judd & Patricia A. Oswald, *Employment Desirability: The Interactive Effects of Gender-Typed Profile, Stimulus Sex, and Gender-Typed Occupation*, 37 SEX ROLES 467, 474 (1997). Judd and Oswald found that "masculine" men were considered most desirable in terms of employability for a position as a firefighter. *Id.* at 471-72. The researchers used terms such as "ambitious," "strong-willed," and "determined" to describe "masculine" gender traits. See *id.* at 470. Judd and Oswald found no differences in the way that men and women evaluated the employment desirability of the applicants. *Id.* at 475. This latter result is not consistent across studies. *Id.* at 475; see also Jennifer J. Deal & Maura A. Stevenson, *Perceptions of Female and Male Managers in the 1990s: Plus ça Change . . .*, 38 SEX ROLES 287, 298-99 (1998) (finding significant differences in the characteristics attributed by men and women to successful women managers); cf. John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 18 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (reporting that white evaluators gave higher ratings to a "highly qualified white applicant, with exactly the same credentials" as a highly qualified black applicant).

students, the fact that one of the officers hailed from a different department validated the interview as an objective procedure.

As I listened to the discussion, I realized that the students⁸ explained their decision by reference to what I call the "meritocracy myth."⁹ The meritocracy myth reflects dominant cultural assumptions about employment opportunity and success, and is comprised of two interconnected beliefs. The first is an assumption that employment discrimination is an anomaly. The second is a belief that merit alone determines employment success.

Increasingly, these assumptions about employment opportunity and merit are driving federal court decisions in employment discrimination cases. An analysis of recent federal cases involving challenges to hiring, promotion, or discharge decisions based on race,¹⁰ sex,¹¹ race and sex, or retaliation¹²

8. You could argue that college students do not know much about hiring and promotion decisions and, hence, their beliefs about the system are not relevant. Yet my students' beliefs accurately reflect dominant cultural assumptions about discrimination and merit. Most white Americans, for example, believe that discrimination does not impair employment opportunities for black Americans. See *infra* notes 23, 32-35, and accompanying text. In addition, a majority of Americans attribute success to ability and hard work, not luck. See *infra* notes 20-21 and accompanying text.

9. Myths are fictional stories about the origins of the world or of a particular culture. Larger-than-life heroes and gods and goddesses often people these stories, which are true in the sense that they reflect the psyche of that particular culture. DAVID LEEMING & JAKE PAGE, MYTHS, LEGENDS, AND FOLKTALES OF AMERICA: AN ANTHOLOGY 3 (1999). In this Article, I use the term "myth" as a form of "group delusion—a widely held belief that is simply not true." *Id.* at 3.

10. Although other racial minority groups experience discrimination in employment, the race discrimination cases and studies discussed in this Article primarily focus on the experiences of black men and women.

11. I use the term "sex" rather than "gender" in this Article. As the case law indicates, however, Title VII applies to discrimination based not only on biological sex, but also on cultural stereotypes associated with one sex or the other. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). Thus, in this Article, the phrase "sex discrimination" encompasses discrimination on the basis of biological sex as well as gender.

12. This Article is based on the results of two LEXIS searches, which produced a total of 365 federal district court and U.S. court of appeals cases. I used the following search: "(((Legitimate pre/3 nondiscriminatory) pre/3 reason) or pretext) w/50 (((more or most or better or best or high*** or superior or strong*** or less or inferior or poor*** or weak*** or lower) w/20 (qualification* or qualified or qualit*** or credential* or interview* or resume*)) or unqualified) and ((sex or gender or race or black or white or African) w/10 discriminat***)."

The first search, which produced a total of 238 cases, covered all federal district court cases for the two-year period starting on January 1, 1998 and

reveals that many federal courts adhere to a narrow and outmoded conception of discrimination as overt, negative, and conscious bias.¹³ Because many federal courts fail to recognize that discrimination now manifests itself in more subtle ways, they often grant summary judgment to employers because plaintiffs have not offered evidence that conforms to the courts' model of traditional prejudice. By doing so, these courts reflect and reinforce cultural beliefs central to the meritocracy myth.

In Part I of this Article, I contrast the elements of the meritocracy myth with the reality of employment opportunity for blacks and women in today's market. Part II provides an analysis of recent federal court decisions involving disparate treatment claims of race, sex, race and sex discrimination, or retaliation. I conclude that the federal courts are chipping away at the ability of plaintiffs to construct successful cases of intentional discrimination based on circumstantial evidence. In Part II.B, I examine the trend in the federal courts toward narrowing the inquiry into the legitimacy of the employer's legitimate, nondiscriminatory reason so that employers may prevail on a motion for summary judgment even when the plaintiff presents evidence that the challenged employment decision was illogical or unreasonable. Part II.C explores how some federal courts have improperly converted contested issues of fact into issues of law, making it easier for employers to win

ending December 31, 1999. The second search, which produced a total of 127 cases, covered all U.S. court of appeals decisions for the four-year period from January 1, 1996 through December 31, 1999.

I eliminated 65 cases from the federal district court pool of cases and 42 from the court of appeals pool because the cases (1) raised claims of neither race nor sex discrimination, nor retaliation based on asserting claims of race or sex discrimination; (2) did not involve an employment law issue, such as a housing discrimination complaint; (3) raised claims only of reverse race, sex, or race and sex discrimination; or (4) would have involved double counting, such as motions to reconsider or rehearings en banc. (If a plaintiff alleged national origin discrimination, but not race or sex discrimination, I eliminated the case from the pool of cases. The plaintiff's allegations determined whether I treated the case as one of discrimination based on national origin, race, or race and national origin. Deleting the national origin claims did not alter the summary judgment figures contained *infra* at note 140.) I also excluded cases where the plaintiff claimed retaliation based on having previously asserted claims other than race or sex discrimination.

This left 173 federal district court cases and 85 U.S. court of appeals cases, or a total of 258 cases. I based my summary judgment calculations on this remaining pool of 258 cases. See *infra* note 140. The results of the search are on file with the author.

13. See *infra* notes 75-78 and accompanying text.

summary judgment motions. In Part II.D, I explain how both the Fifth and the Tenth Circuits have raised the evidentiary bar for plaintiffs, even at the summary judgment stage, by requiring plaintiffs to provide evidence that their qualifications are clearly or overwhelmingly better than the candidate selected by the employer. Part II.E examines the decisions of those courts that have adopted the "honest belief" standard. This standard effectively requires the plaintiff to provide direct evidence of discrimination by insulating from judicial review any challenged employment decision where the employer can claim that it honestly believed it promoted the most qualified candidate. Finally, in Part II.F, I argue that the Supreme Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*,¹⁴ in which the Court rejected the mandatory pretext-plus approach followed by several circuits, will have little impact on the alarming rate at which federal courts grant employer motions for summary judgment and judgment as a matter of law.

While substantial research describes how discrimination in today's market operates in subtle ways, the federal courts increasingly are requiring plaintiffs to provide evidence of overt and traditional forms of bias in order to prevail in disparate treatment cases. Instead of adapting the flexible circumstantial evidence case to address the changing nature of employment discrimination, many federal courts have transformed the circumstantial evidence case into a "toothless tiger."¹⁵ By doing so, the courts reinforce dominant cultural beliefs about equal opportunity and, at the same time, ensure that employment discrimination continues to deny equal opportunity to certain members of the American work force.

I. THE MERITOCRACY MYTH AND THE REALITY OF AMERICAN EMPLOYMENT OPPORTUNITY

A. INTRODUCTION

The stories that a culture creates about itself reflect the values and beliefs that its people cherish. These myths and legends¹⁶ "are like those mirrors in which we apply makeup or

14. 120 S. Ct. 2097 (2000).

15. See *Marzano v. Computer Science Corp.*, 91 F.3d 497, 507 (3d Cir. 1996) (using the phrase).

16. Unlike myths, legends "tend to be based on actual events and persons

even disguises, designing images of who we think we are, how we believe we should appear to the world, and how we think we should perform in it."¹⁷ One such story, the distinctly American myth of the self-made man, as epitomized by the Horatio Alger story,¹⁸ underscores the American belief that any person can succeed, regardless of birth or upbringing, so long as he possesses sufficient talent, grit, and determination. Although the Horatio Alger story no longer dominates the American cultural landscape, a similar meritocracy myth has evolved to explain and rationalize differences in achievement and success within the United States today.

The meritocracy myth is the product of two intertwined beliefs. The first, which is critical to the structure of the myth, is the belief that employment discrimination no longer exists for blacks and women. It is a conception of discrimination as traditional prejudice: overt, conscious, and negative bias.¹⁹ While acknowledging that historic discrimination once served to compromise the American belief in equal opportunity, such discrimination is now considered a relic of the past. Second, because race and sex discrimination no longer restrict employment opportunities for qualified blacks and women, current employment decisions are viewed as objective and fair. Unless affirmative action interferes with the decision making process, the belief is that merit *alone* ensures that the most qualified individual receives the job. According to the myth, differences in outcomes result not from unequal opportunity and discrimination, but from unequal talent and effort.²⁰

The meritocracy myth draws on a long legacy of American stories about opportunity and accomplishment.²¹ Its success as

and, over time, are carefully tailored, often exaggerated, and serve to express some group aspiration." LEEMING & PAGE, *supra* note 9, at 5. Davy Crockett is an example of an American legend. *See id.*

17. *Id.* at 3.

18. This example is drawn from LEEMING & PAGE, *supra* note 9, at 4.

19. *See infra* notes 75-78 and accompanying text.

20. *See* SONIA OSPINA, ILLUSIONS OF OPPORTUNITY: EMPLOYEE EXPECTATIONS AND WORKPLACE INEQUALITY 13-14 (1996) (describing how over time Americans have stubbornly held to the belief that unequal economic rewards stem from differences in individual motivation, not opportunity, to succeed).

21. The belief that hard work and ability, not luck or help from other people, account for success has remained fairly stable among Americans over the past sixty years. *See id.* at 14. Clarence Thomas, the 106th justice to sit on the United States Supreme Court, exemplifies this belief—a modern-day Horatio Alger. *See* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE

a myth lies in its ability to capture the spirit of American beliefs about employment opportunity and economic success. But while the myth may capture dominant American beliefs, those beliefs fail to accurately reflect the reality of employment opportunities for blacks and women in the United States today.

B. THE MERITOCRACY MYTH

The cornerstone of the meritocracy myth is the belief that employment discrimination against blacks and women is "a thing of the past."²² A majority of white Americans do not believe that race discrimination affects employment opportunities for black Americans in today's market.²³ For example, corporate CEOs "perceive well-educated and experienced African American men as having *unlimited* opportunities in Corporate America."²⁴ Similarly, the presence of significantly more women in traditionally male fields is offered as evidence that sex discrimination no longer operates

SELLING OF CLARENCE THOMAS 31-61 (1994) (discussing the mythology surrounding Thomas's Pin Point, Georgia childhood). News stories commonly referred to Thomas's humble origins in Georgia. See Sam Fulwood III & Douglas Jehl, *Thomas Takes Oath as Justice of High Court*, L.A. TIMES, Oct. 19, 1991, at A1; Julia Malone, *Dozens of Georgia Kin See Thomas Sworn In*, ATLANTA J. & CONST., Oct. 19, 1991, at A7; Susan Page, *The 106th Justice: Amid Supreme Pomp, Clarence Thomas Is Sworn In*, NEWSDAY, Oct. 19, 1991, at 5; Joan Verdon, *The Week in Review*, THE RECORD, Oct. 20, 1991, at A22. His ascent to the Supreme Court from a childhood spent in the segregated South and as the grandson of a poor sharecropper appealed to many Americans. Thomas's rise to the Court reinforced the basic American belief that any person in the United States, black or white, rich or poor, can reach the pinnacle of success if he has talent, works hard, and is determined to succeed.

22. See DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 143 (1997) ("[W]omen's recent history in American workplaces looks like a triumphant tale. Once upon a time, sex discrimination sometimes happened, but those days are gone."); Steven A. Tuch & Michael Hughes, *Whites' Racial Policy Attitudes*, 77 SOC. SCI. Q. 723, 726 (1996) (stating that most white Americans believe race discrimination has been effectively eliminated).

23. See Lawrence Bobo & James R. Kluegel, *Opposition to Race-Targeting: Self-Interest, Stratification Ideology, or Racial Attitudes?*, 58 AM. SOC. REV. 443, 459 (1993) (stating that "54 percent of blacks see 'a lot' of discrimination in jobs compared to only 24 percent of whites"); Tuch & Hughes, *supra* note 22, at 726 (stating that "a majority of whites believe blacks do not encounter racially based barriers to economic progress" (citation omitted)).

24. THE FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL: THE ENVIRONMENTAL SCAN: A FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION 66 (1995) [hereinafter GLASS CEILING REPORT] (emphasis added).

as an impediment to the progress of women in the workplace.²⁵ Male CEOs believe that women have shattered the glass ceiling.²⁶ Poll results demonstrate that men "interpret[] small advances in women's rights as big, and complete, ones; they believe[] women ha[ve] made major progress towards equality"²⁷ The dominant story about employment opportunity in the United States today is that American employers have dismantled the barriers to workplace opportunity. Jobs are no longer overtly segregated by race²⁸ or sex.²⁹ Discrimination, if it exists, is an anomaly.

Yet, by all objective measures, white men still are doing significantly better in the workplace than blacks and women.³⁰ The meritocracy myth, however, does not demand equal *outcomes*; it focuses on equal *opportunity*. "What [American] society cherishes most is the notion of equality before the law, which, in theory, results in the opportunity for individuals to

25. Nijole V. Benokraitis, *Sex Discrimination in the 21st Century, in* SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE 5, 6 (Nijole V. Benokraitis ed., 1997) (citing articles about women's progress and the diminishing role of sex discrimination). See generally RHODE, *supra* note 22, at 1-20 (describing the denial of the persistence of sex discrimination in employment opportunities, pay, and allocation of family responsibilities).

26. See GLASS CEILING REPORT, *supra* note 24, at 144 ("Seventy-three percent of the male CEOs said they don't think there is a glass ceiling [for women]; seventy one [sic] percent of the female vice presidents think there is.").

27. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 60 (1991); see also Beth Bonniwell Haslett & Susan Lipman, *Micro Inequities: Up Close and Personal*, in SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE 39, *supra* note 25 ("[M]en believe that both judicial appointments and the hiring and promotion decisions made within law firms are merit-based." (citing NINTH CIRCUIT COURT GENDER BIAS TASK FORCE 786-87 (1994))); Men, Women in Pharmaceutical Industry See "Glass Ceiling" Issues Differently, *Says Healthcare Businesswomen's Study*, BUS. WIRE, June 3, 1999 (describing a study of middle and upper level managers in the pharmaceutical industry that found that more than 50% of the men surveyed believed women had achieved parity with men within the industry, while more than 75% of the women believed the contrary).

28. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Prior to the effective date of the Civil Rights Act of 1964, Duke Power "openly discriminated" against blacks, employing them only in the firm's labor department, where the highest paying positions paid less than the lowest paying jobs in the white-only departments of the company. *Id.* at 426-27.

29. See, e.g., *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding an ordinance prohibiting newspapers from carrying "help-wanted" advertisements in sex-designated columns).

30. See *infra* Part I.C. (discussing the reality of workplace discrimination).

prove their merit."³¹ Different outcomes caused by differences in talent and hard work do not threaten the American belief in a fair and just system.

According to the meritocracy myth, then, differences in outcome result not from discrimination but from merit. Those who succeed deserve to do so because they are more talented and they work harder than their colleagues. Support for this belief is found in a study by James Kluegel of white Americans' beliefs about the reasons for the continuing gap in socioeconomic status between white and black Americans. Almost 31% of white Americans believe that the black-white socioeconomic gap is due solely to individual differences between the races: either differences in innate ability to learn or differences in motivation to succeed.³² Almost 65% of white Americans base the black-white socioeconomic gap, in part, on individual failings, like lack of motivation or ability.³³ What is interesting is that even among those white Americans who, in part, attribute a structural reason, such as discrimination or educational opportunities, for the existence of the black-white socioeconomic gap, there is only weak support for programs to achieve racial equality.³⁴

[W]e seem to have reached an era of stable, comfortable acceptance by whites of the black-white economic gap. As long as white Americans blame blacks for their economic condition, they have reason to oppose

31. OSPINA, *supra* note 20, at 16 (footnote omitted).

32. See James R. Kluegel, *Trends in Whites' Explanations of the Black-White Gap in Socioeconomic Status, 1977-1989*, 55 AM. SOC. REV. 512, 517 tbl. 3 (1990). In 1988-89, 10.1% of white Americans identified innate ability to learn as the reason for the black-white gap, while 20.4% said that motivation was the reason for the black-white differential in socioeconomic status. *Id.* The survey asked respondents to explain why blacks, on average, "have worse jobs, income, and housing than white people." *Id.* at 514. Respondents could select from four responses, two of which (answers B and D) identified the individual as the locus of blame for differences in socioeconomic status. Answer B stated that differences result "[b]ecause most blacks have less in-born ability to learn." *Id.* (emphasis in original omitted). Answer D said that differences result "[b]ecause most blacks just don't have the motivation or will power to pull themselves out of poverty." *Id.* (emphasis in original omitted).

33. *Id.* at 517.

34. See *id.* at 520-21; see also Steven A. Tuch & Lee Sigelman, *Race, Class, and Black-White Differences in Social Policy Views*, in UNDERSTANDING PUBLIC OPINION 37, 48 tbl.3-3 (Barbara Norrander & Clyde Wilcox eds., 1997) (indicating that fifty percent of white Americans do not believe it is the business of government to ensure fair treatment in the workplace for black Americans).

[] policies [to improve the economic status of black Americans], or to withhold support for them in their private actions.³⁵

This reluctance to support policies to achieve racial equality suggests that the majority of white Americans, even those who attribute differences in outcomes, in part, to structural forces, place most of the blame for the socioeconomic gap on the *individual* failings of black Americans.

This focus on *individual* failings is a centerpiece of the meritocracy myth. Failure, in terms of losing jobs or promotions, results from individual shortcomings, not systemic flaws in selection procedures. Personal shortcomings, in terms of talent, education, effort, or desire, explain the differences in workplace success between white men, on the one hand, and blacks and women, on the other. CEOs claim that a shortage of qualified black men, not discrimination, explains the small number of black men in senior management positions in the United States.³⁶ A majority of white Americans believe that economic disparities between blacks and whites result, in part, from differences in innate ability and motivation.³⁷ For some white male managers, charges of racism are covers for "people of color [to] hide behind" in order to disguise poor performance.³⁸ Race and sex do not prevent success. "[A]nyone can make it to the top . . . if they're willing to put in the effort."³⁹

As for the progress of women in the workplace, one commentator claims that the innate superiority of men at construction work, not sex discrimination, accounts for the small number of women who hold jobs in construction.⁴⁰ Most CEOs discount the role of discrimination in the progress of women towards upper-level management. They believe that

35. Kluegel, *supra* note 32, at 524.

36. GLASS CEILING REPORT, *supra* note 24, at 59.

37. See *supra* text accompanying notes 32-35; see also L.A. Rollins, *Affirmative Action—Equality Is a Myth*, SEATTLE TIMES, March 14, 1998, at A11 (Letters to the Editor) ("[E]conomic inequalities between blacks and whites are not due solely and exclusively to racism . . . '[E]quality' is a myth, and . . . people will never, ever be equal.").

38. Nancie Zane, *Interrupting Historical Patterns: Bridging Race and Gender Gaps Between Senior White Men and Other Organizational Groups*, in OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY 343, 346 (Michelle Fine et al. eds., 1997).

39. *Id.* at 345.

40. Andy Rooney, *Men Are Better at Some Jobs Than Women*, BUFFALO NEWS, Oct. 4, 1998, at 3H.

the glass ceiling no longer exists for women.⁴¹ Instead, they claim that women do not figure prominently in the upper echelons of management because they lack quantitative skills, will not work long hours, and are not as committed to their careers as are their male counterparts.⁴² Thus, the meritocracy myth attributes differences in success within the workplace to the choices that women make and to the role that inherent capabilities play in the selection of the most qualified candidate to perform the job.⁴³

The myth's focus on individual talent and hard work as the sole determinants of success in the workplace plays itself out in the debate over affirmative action. Affirmative action is viewed as a threat to the meritocracy because it permits the hiring and promotion of "less qualified" blacks and women.⁴⁴ The

41. See GLASS CEILING REPORT, *supra* note 24, at 145; see also Preston McHenry, *For Women, Reverse Discrimination Worse*, COMPUTERWORLD, July 19, 1999, at 33 (Letters to the Editor) ("As an executive in IT for 30 years . . . I have observed most human behaviors that can affect IT job performance. Sex discrimination is among the rarest of these.").

42. See GLASS CEILING REPORT, *supra* note 24, at 151.

43. See RHODE, *supra* note 22, at 10 ("[A] common view is that women's choices and capabilities explain women's disadvantages."); Roger Clegg, *Democrats' Comparable Worth Bill Does Not Fight Real Gender Discrimination, Imposes an Unnecessary Burden on Employers, and Interferes with the Free Market*, LEGAL TIMES, July 19, 1999, at 17 ("The reason for any remaining disparities is not discrimination, but the different choices made by men and women about the jobs and hours they work.").

44. See, e.g., VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 278 (1998) ("The nonwhite or nonmale candidate is perceived at the outset as having fewer qualifications and therefore as less deserving than the white male; affirmative action is needed in order to compensate for the candidate's poor qualifications."); Linda David, *Quasim Not Qualified*, SEATTLE TIMES, June 12, 1999, at A15 (Letters to the Editor) ("Lyle Quasim obviously is not qualified and most probably would not have gotten the job if not for affirmative action. Happens all the time."); Charles Kluepfel, *Affirmative Action Has Its Victims; Preparatory Schools?*, N.Y. TIMES, Sept. 13, 1998, at 20 (Letters to the Editor) (arguing that white students without connections are hurt by affirmative action, which benefits "some blacks with lower merit"); Joseph W. Morgan, *Call a Halt to Affirmative Action*, ARIZ. BUS. GAZETTE, May 6, 1999, at 5 (Letters to the Editor) ("The only fair policy is a policy that looks at merit alone. This is the only policy that is fair to everyone and does not lower standards."); John G. Nash, *Affirmative Action Is a Form of Racial Prejudice*, ST. PETERSBURG TIMES, Mar. 27, 1999, at 17A (Letters to the Editor) ("[Affirmative action] has accomplished little other than lowering academic standards, reducing the quality of products and services provided by agencies and offices forced to hire unqualified applicants and precipitating racial hatred."); Thomas S. Overbeck, *Affirmative Action—I-200 Renders What Is Just*, SEATTLE TIMES, Mar. 8, 1998, at B7 (Letters to the Editor) ("Preferential hiring promotes the idea that a minority is hired because of

language used to oppose affirmative action—standards, qualifications, and merit—highlights the firmly held belief that current methods of hiring and promotion are fair and objective.⁴⁵

Acknowledging that race discrimination still poses a significant barrier to employment opportunity “challenges the legitimacy of the broader system from which whites’ relative privilege derives.”⁴⁶ Admitting that race and sex discrimination still play a significant role in hiring and promotion decisions means accepting that merit *alone* does not determine success. This undermines not only the entire meritocracy myth, but also “the generalized belief in an inherently just world.”⁴⁷ It is easier to believe that the “other,” whether a black person or a woman, lacks the education, skills, talent, or motivation to succeed than to believe that success is determined, at least in part, by accidents of birth: having white skin or male sex characteristics.

C. THE REALITY OF WORKPLACE OPPORTUNITY

Disturbing disparities emerge when aggregate data on the workplace success of white men is compared with that of blacks and women. First, jobs in the U.S. labor market are segregated both by race and by sex.⁴⁸ Occupational race and sex segregation is not a neutral phenomenon; blacks and women feel its effects disproportionately. “[T]he continued segregation of blacks in low-paid, low-skill occupations ensures blacks’ continuing economic disadvantage.”⁴⁹ Occupational sex segregation also disadvantages women: lower pay, the absence

their [sic] gender or race and not because of their [sic] qualifications and merit.”).

45. See OSPINA, *supra* note 20, at 14 (discussing the “strongly ingrained ideology of merit in the mind of the average American worker”); VALIAN, *supra* note 44, at 278 (writing that misunderstandings about affirmative action stem, in part, from “our faith that hiring procedures are normally meritocratic, so that the best person gets the job”).

46. Bobo & Kluegel, *supra* note 23, at 459.

47. OSPINA, *supra* note 20, at 13 (citations omitted).

48. Elissa L. Perry et al., *Explaining Gender-Based Selection Decisions: A Synthesis of Contextual and Cognitive Approaches*, 19 ACAD. MGMT. REV. 786 (1994); BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES* 3-7 (1990).

49. RESKIN & ROOS, *supra* note 48, at 7.

of benefits, and fewer chances for promotion characterize traditionally female jobs.⁵⁰

Second, while white men comprise approximately 43% of the U.S. work force,⁵¹ in Corporate America, they are disproportionately represented at the highest levels of management. Almost 97% of senior managers at Fortune 1000 industrial and Fortune 500 service firms are white.⁵² Between 95% and 97% of senior managers of Fortune 1500 firms are male,⁵³ and minority women comprise a mere 5% of those 3% to 5% of senior management positions held by women.⁵⁴ Even holding constant educational achievement, white men account for a disproportionate share of executive, administrative, and management jobs.

[W]hite men have 68 percent more of the executive, administrative, and managerial positions than should be expected . . . —all things being equal. . . . [W]hite men are overrepresented in top positions regardless to [sic] educational levels. Black women are the most underrepresented group in executive, administrative, and managerial occupations for each educational level, when compared to Black men and white non-Hispanic men and women.⁵⁵

White men are also disproportionately represented among the ranks of Fortune 500 CEOs (95%),⁵⁶ daily newspaper editors (90%),⁵⁷ law firm partners (85%),⁵⁸ tenured professors (between 70%⁵⁹ and 85%⁶⁰), and TV news directors (77%).⁶¹ As of 1993,

50. Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 242 (1993); Deborah J. Vagins, *Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RTS. L. REP. 79, 80-81 (1996).

51. GLASS CEILING REPORT, *supra* note 24, at 12 (based on 1990 U.S. Census data). Other authors use lower figures for the percentage of men in the U.S. population. See David Gates, *White Male Paranoia*, NEWSWEEK, Mar. 29, 1993, at 48 (stating that, as of 1993, white men comprised 39.2% of the U.S. population); Benokraitis, *supra* note 25, at 5 (stating that white men comprised 33% of the U.S. population in the mid-1990s). The differences are due to changes in population over time, as well as the fact that the U.S. Census Data is based on the percentage of white men in the U.S. labor force. The other figures measure white men as a percentage of the total population, not the U.S. labor force.

52. GLASS CEILING REPORT, *supra* note 24, at 9.

53. *Id.* at 12.

54. *Id.* at 10.

55. *Id.* at 74.

56. Benokraitis, *supra* note 25, at 5.

57. Gates, *supra* note 51, at 48.

58. Benokraitis, *supra* note 25, at 5.

59. Gates, *supra* note 51, at 48.

60. Benokraitis, *supra* note 25, at 5.

86% of federal courts of appeals judges and 88% of federal district court judges were men.⁶²

The disparities also extend to pay between black and white employees. Black male executives, administrators, and managers who hold professional degrees earn 79% of what their white male counterparts, in the same positions with the same degrees, earn.⁶³ Black women fare even worse; they earn 60% of the average salary for a similarly situated white male executive, administrator, or manager holding the same degree.⁶⁴ One study found that as the percentage of black workers increased at a firm, black workers' wages declined.⁶⁵ The race effect, however, was one-sided. Researchers found that the increase in percentage of black workers at the firm benefited white workers; their wages increased as a result of the change in the firm's racial composition.⁶⁶

Aggregate differences in pay also exist between men and women. A 1990 survey of 3664 MBA students from the top twenty business schools found that in the first year after graduation men earned an average of \$61,400 while their female classmates earned an average of \$54,749.⁶⁷ A study by Linda Stroh, Jeanne Brett, and Anne Riley of 1029 female and male managers from twenty Fortune 500 companies found that sex, not educational achievement, geographic mobility, or industry differences, accounted for 2% of the salary differential between female and male managers.⁶⁸ When Stroh and her

61. Gates, *supra* note 51, at 48.

62. *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1678 n.7 (1996).

63. GLASS CEILING REPORT, *supra* note 24, at 80; cf. Mark Cassell & Amy Hanauer, *Economy Booms, But Wages Fall; Dropouts Suffer Most, Highly Educated Avoid Income Erosion*, THE PLAIN DEALER, July 8, 1999, at 9B (stating that wages of black men in Ohio have dropped 28% in the past 20 years).

64. GLASS CEILING REPORT, *supra* note 24, at 80; see also Cassell & Hanauer, *supra* note 63, at 98 (reporting that over the past twenty years in Ohio, the real wages of white women have increased, albeit slightly, while the real wages of black women have dropped).

65. Barbara F. Reskin et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANN. REV. SOC. 335, 353 (1999) (citing William J. Carrington & Kenneth R. Troske, *Interfirm Segregation and the Black/White Wage Gap*, 16 J. LAB. ECON. 231 (1998)).

66. *Id.*

67. GLASS CEILING REPORT, *supra* note 24, at 13; see also Cassell & Hanauer, *supra* note 63 (stating that a gender pay gap still exists in Ohio).

68. Linda K. Stroh et al., *All the Right Stuff: A Comparison of Female and Male Managers' Career Progression*, 77 J. APP. PSYCHOL. 251, 254-57 (1992).

colleagues held constant the number of years that female and male managers had been in the work force and at their current firms, they found that the salaries of female managers had increased 54% during the five years prior to the study while the salaries of male managers had increased by 65% during that same time period.⁶⁹ A more recent study of seventy-two female and male managers of a multinational financial services firm found that "the female executives received fewer stock options than the male executives, even after controlling for level of education, performance rating, and level in the management hierarchy."⁷⁰

If discrimination is a relic of the American past, what accounts for these disparities in position, power, and pay between blacks and women, on the one hand, and whites and men, on the other? The meritocracy myth posits that differences in talent, training, skill, and effort explain these differences in outcomes. A significant body of evidence, drawn from government reports and empirical studies, however, contradicts this basic assumption of the meritocracy myth. The research shows that the *nature* of discrimination in the workplace has changed.

Traditional prejudice certainly has not disappeared.⁷¹ "[R]esistance to minorities and women [on the job] can be severe, especially 'at the beginning' . . ."⁷² But, over the past forty years, the percentage of white Americans who adhere to overtly racist beliefs has declined significantly.⁷³ With this

69. *Id.* at 255.

70. Karen S. Lyness & Donna E. Thompson, *Above the Glass Ceiling? A Comparison of Matched Samples of Female and Male Executives*, 82 J. APP. PSYCHOL. 359, 371 (1997); see also Aaron Bernstein, *Stock Options Bite Back*, BUS. WK., June 14, 1999, at 50 (describing a sex discrimination lawsuit against West Group that alleged that the firm's chief executive officer offered male employees opportunities to participate in the firm's stock purchase program that were denied to similarly situated female employees).

71. See, e.g., Dovidio & Gaertner, *supra* note 7, at 4 ("10%-15% of the white population still expresses the old-fashioned, overt form of bigotry."); Marie Cocco, *Merchants of Hate Increase and Prosper*, THE PLAIN DEALER, Mar. 8, 1999, at 7B (describing increase in hate groups); Carey Goldberg, *Boston Settles Lawsuit by Harassed Minority Tenants*, N.Y. TIMES, July 27, 1999, at A14 (reporting that the Boston Housing Authority (BHA) settled a lawsuit, brought by the Department of Housing and Urban Development and minority plaintiffs, charging "systemic discrimination" by the BHA for failing to stop racial harassment of minority tenants by white tenants).

72. GLASS CEILING REPORT, *supra* note 24, at 59 (emphasis in original).

73. See Bobo & Kluegel, *supra* note 23, at 443 (citing a steady decline since the 1940s in the percentage of white Americans "adher[ing] to Jim Crow

decline in overtly discriminatory beliefs, however, comes a concomitant belief that the playing field is now level for all players, regardless of race or sex. "Many white Americans now believe that since they are no longer racially prejudiced there are no barriers to opportunity for blacks."⁷⁴ The problem lies in the meritocracy myth's definition of discrimination as traditional prejudice.⁷⁵ The paradigmatic intentional race or sex discrimination case is based on a model of overt,⁷⁶

racism"); Dovidio & Gaertner, *supra* note 7, at 4 (explaining that whites are more accepting of and have less negative attitudes about blacks).

74. Kluegel, *supra* note 32, at 513.

75. See Richard D. Ashmore, *The Problem of Intergroup Prejudice*, in BARRY E. COLLINS & RICHARD D. ASHMORE, *SOCIAL PSYCHOLOGY* 246, 253 (1970) ("Prejudice is a negative attitude toward a socially defined group and toward any person perceived to be a member of that group." (emphasis in original omitted)); Samuel L. Gaertner et al., *Does White Racism Necessarily Mean Antiblackness? Aversive Racism and Prowhiteness*, in *OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY*, *supra* note 38, at 168 (noting that traditional definitions of prejudice involve negative feelings and beliefs).

76. See, e.g., *Taylor v. Va. Union Univ.*, 193 F.3d 219, 236 (4th Cir. 1999) (noting that a panel that had ranked a female plaintiff lower than a male candidate for promotion had "no history of discriminatory animus toward women"), *cert. denied*, 120 S. Ct. 1243 (2000); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) (affirming an order granting summary judgment to the employer on an applicant's sex and age discrimination claims, stating that there was "little merit in [plaintiff's] argument that United based its employment decisions on gender and age stereotypes" because "the record reveal[ed] little that could be construed as stereotyped assumptions about the qualifications, work habits, or personality traits of female or older interviewees" (citation omitted)); *Austin v. Apfel*, No. CV-97-J-1741-S, 1999 U.S. Dist. LEXIS 17483, at *17-18 (N.D. Ala. Oct. 14, 1999) (granting summary judgment for the employer on the plaintiff's race and sex discrimination claims and noting that even though selecting official had "never received training on how to make selections for promotions, nor was he given any formal written criteria," plaintiff knew of no "incident which caused her to believe [the selecting official] would discriminate against someone because of his or her race" (citations omitted)); *Romero v. Banco Popular de P.R.*, 35 F. Supp. 2d 195, 199 (D.P.R. 1999) (granting summary judgment to the employer on the plaintiff's claim of race and color discrimination and concluding that sworn statements of the plaintiff's supervisor and another retired bank official about unwritten rules at the bank about not promoting black candidates should concern management, but "fail[ed] to establish that the bank discriminated against [plaintiff] in particular"), *aff'd in part, vacated in part*, 212 F.3d 607 (1st Cir. 2000) (affirming the decision as to failure to promote and constructive termination claims, but remanding on a race-based harassment charge); cf. *Byrnie v. Town of Cromwell Pub. Schs.*, 73 F. Supp. 2d 204, 215 (D. Conn. 1999) ("[The plaintiff] testified that there was nothing overt that led him to believe that there was age bias in the interview process." (citation omitted)); *Ayan v. Cal. Teachers Ass'n*, No. C97-4525 MHP, 1999 U.S. Dist. LEXIS 3810, at *3 (N.D. Cal. Mar. 25, 1999) (granting summary judgment to the employer on the

negative,⁷⁷ and conscious⁷⁸ action taken against a member of a protected group, such as a black man. Because the meritocracy

plaintiffs' national origin claims, noting that "[i]n her deposition, [one of the plaintiffs] was repeatedly asked to recall specific instances exemplifying racial animus, . . . [but could] recall[] no specific instance of an employee using racial slurs or discriminatory comments regarding her national origin" (citations omitted)).

The Texaco race discrimination case illustrates the prevailing concept of discrimination as overt bias. Until *The New York Times* broke the story of the secret tape recordings of Texaco executives allegedly referring to black employees as "fucking niggers" and "black jelly beans," the class action race discrimination lawsuit against Texaco received limited media attention. Alison Frankel, *Tale of the Tapes*, AM. LAW., Mar. 1997, at 64. The racial epithets, however, provided the "smoking gun" for the race discrimination plaintiffs—"real" evidence of conscious, overt, and negative bias against black Texaco employees. The story spread like wildfire. Texaco hired an expert to enhance the audio on the tapes. *Id.* at 66. The expert concluded that the Texaco executive on the tape, in the course of discussing Hanukkah and Kwanzaa, actually said "poor St. Nicholas," not "fucking niggers." *Id.*

The fall-out from Texaco's disclosures of the alleged actual content of the tape recordings was not surprising. The "smoking gun" theory of discrimination requires overt and conscious bias, and the tapes provided that evidence. Without it, some commentators questioned whether racism actually existed at Texaco. *See id.*

To the frustration of civil rights leaders, debate hinged on whether *The New York Times* had been duped by plaintiffs' lawyers, and whether, since no one actually said "fucking niggers" on the tapes, the transcripts showed high-level racism at all. . . .

....
... To reduce the question of race discrimination at Texaco to whether its former treasurer said "nigger" or "Nicholas" is absurd. . . .

The story of the Texaco tapes is irresistible. . . . But what that story misses is how willingly we sidestepped a discussion of the merits of the suit. When this case was just about African-Americans making serious claims of discrimination at one of the biggest companies in the country, no one paid much attention. . . . Only when the tapes surfaced did the world take notice—and then, only of what was on the tapes. . . .

But if there's no tape in the next case, will anyone care?

Id. at 66-67.

77. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[D]ecisionmakers placed substantial *negative* reliance on an illegitimate criterion in reaching their decision." (emphasis added)); Gaertner et al., *supra* note 75, at 168 (stating that "modern, subtle forms of bias . . . may be characterized by a significant component of prowhite (i.e., pro-ingroup) attitudes" as opposed to primarily anti-black attitudes); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other Isms)*, in STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED* 85, 91 (1996) ("Race and sex, moreover, become significant only when they operate to explicitly *disadvantage* the victims; because the *privileging* of whiteness or maleness is implicit, it is generally not perceived at all." (quoting Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*

myth identifies discrimination as traditional forms of overt bias, most white Americans believe discrimination no longer exists. A similar phenomenon operates with regard to sex discrimination on the job. "What explains this gap between popular perceptions and concrete data on gender inequality? Part of the explanation lies with selective perception. Men often deny bias because they fail to recognize it."⁷⁹

The other part of the explanation, however, lies with the privilege of belonging to the dominant group. "[M]embers of dominant groups assume that their perceptions are the pertinent perceptions . . ."⁸⁰ Defining discrimination in the traditional lexicon of prejudice, as conscious, overt, and negative bias, relieves the dominant group from responsibility for examining the privileges that obtain by virtue of their race, sex, or both.⁸¹ Whatever the motivation behind the failure to recognize the continued operation of race and sex discrimination in the American workplace, the failure itself results from an outmoded and limited definition of discrimination.

Discrimination today is more subtle and difficult to identify. Studies show that people often are unable to

Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 150-51)); John Dovidio, "Aversive" Racism and the Need for Affirmative Action, CHRON. OF HIGHER EDUC., July 25, 1997, at A60 ("[Whites] frequently express their bias indirectly, by favoring whites rather than discriminating against blacks and members of other minority groups.").

78. See, e.g., *Price Waterhouse*, 490 U.S. at 250 ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." (footnote omitted)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (stating that disparate treatment cases require plaintiff to prove defendant's "discriminatory intent or motive"); SUSAN D. CLAYTON & FAYE J. CROSBY, JUSTICE, GENDER, AND AFFIRMATIVE ACTION 39 (1992) ("Equal opportunity policies operate as if intentions were all that mattered, placing too much faith in the conscious control of behavior."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1167 (1995) ("In the stories told by disparate treatment caselaw, there is no discrimination without an invidiously motivated actor."); Dovidio, *supra* note 77 (noting preference for affirmative action because of the difficulty of proving discriminatory intent).

79. RHODE, *supra* note 22, at 3.

80. Grillo & Wildman, *supra* note 77, at 91.

81. See RHODE, *supra* note 22, at 3-4; Bobo & Kluegel, *supra* note 23, at 459; Grillo & Wildman, *supra* note 77, at 90-91.

recognize discrimination on a case-by-case basis.⁸² A study involving 136 MBA students at Northwestern University found that the students were significantly more likely to find pay disparities in a hypothetical company when those disparities were conspicuous, for example where women with higher rank or more years of experience were paid less than men in the same department.⁸³ Unless an employer expresses outright hostility to a particular group, people explain disparities between groups by looking for *individual*, not *systemic*, reasons.⁸⁴ Thus, people conclude that an employer who pays a male employee more than a female employee does so not because of bias, but because the male employee has more education or because the female employee is less dedicated to the job. It is only when cumulative employment data is available that people are better able to identify discrimination as the reason for significant disparities between black and white, and male and female, employees.⁸⁵

It is this changing nature of discrimination that makes it hard to identify. Administrators at the Massachusetts Institute of Technology acknowledged that they had been blinded to the effects of sex discrimination at MIT's School of Science because what they observed did not fit their traditional ideas of what discrimination looked like.

How else might we explain what happened to the senior women faculty in Science? . . . [A] critical part of the explanation lies in our collective ignorance. We must accept that what happened to the tenured women faculty in the School of Science is what discrimination is. . . . But we, including for a long time the women faculty themselves, were slow to recognize and understand this for several reasons. First, *it did not look like what we thought discrimination looked like*. . . . [G]ender discrimination turns out to take many forms and many of these are not simple to recognize. Women faculty who lived the experience came to see the pattern of difference in how their male and female colleagues were treated and gradually they realized that this was discrimination. But when they spoke up, no one heard them, believing that each problem could be explained alternatively by its "special circumstances."⁸⁶

82. See CLAYTON & CROSBY, *supra* note 78, at 76-79.

83. Christel G. Rutte et al., *Organization of Information and the Detection of Gender Discrimination*, 5 PSYCHOL. SCI. 226, 226-29 (1994).

84. See CLAYTON & CROSBY, *supra* note 78, at 79.

85. See *id.* at 76-79; Dovidio & Gaertner, *supra* note 7, at 17 ("If the decisions that people make are biased in systematic ways, they will have biased outcomes for minorities and nonminorities."); see also *supra* text accompanying notes 48-70 (providing such cumulative data).

86. *A Study on the Status of Women Faculty in Science at MIT*, MIT FAC.

As the MIT Report suggests, most Americans fail to recognize discrimination because it does not “*look like what we [think] discrimination [should] look[] like.*”⁸⁷ It is a mistake, however, to then conclude that discrimination no longer affects the employment opportunities of blacks and women.

Numerous studies demonstrate that race and sex subtly influence our evaluations of performance, even when individual candidates possess *equal objective* qualifications. For example, one study found that white evaluators judge white candidates more favorably than equally qualified black candidates.⁸⁸ Researchers recruited college students to help make admissions decisions for the students’ university.⁸⁹ Students received profiles of poorly qualified, moderately qualified, and highly qualified black and white applicants.⁹⁰ Photos were attached to applications in order to determine the impact of race on the students’ evaluations.⁹¹ The researchers found that poorly qualified black and white applicants received similarly low scores from the students.⁹² But racial bias emerged in students’ evaluations of moderately and highly qualified applicants.

[Participants] showed some bias when they evaluated the moderately qualified white applicant slightly higher than [the] comparable black candidate. Discrimination against the black applicant was most apparent, however, when the applicants were highly qualified. . . . Although white participants evaluated the highly qualified black applicant very positively, *they judged the highly qualified white applicant, with exactly the same credentials, as even better.*⁹³

The overall evaluation of the black and white applicants was comprised of a number of individual items, some objective, such as grade point average, and others subjective. The researchers discovered that bias increased “[t]he less directly related the

NEWSL., Mar. 1999, at 12 [hereinafter MIT REPORT] (emphasis in original); see also CLAYTON & CROSBY, *supra* note 78, at 79 (“People may also have ideas about what discrimination ‘looks like.’ They may feel, for example, that discrimination only occurs when there is the intention to discriminate, or when a man earns much more than an equally qualified woman.”).

87. MIT REPORT, *supra* note 86, at 12 (emphasis in original); see also CLAYTON & CROSBY, *supra* note 78, at 79.

88. Dovidio & Gaertner, *supra* note 7, at 17-18.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 18 (emphasis added).

item was to the transcript information.”⁹⁴ Subjective evaluation criteria, then, provided the white students with the ability to make facially neutral decisions that ultimately were motivated by racial bias, a finding consistent with earlier studies of the impact of subjective criteria on whites’ evaluation of blacks’ work performance.⁹⁵

Researchers at the University of Minnesota found that a supervisor’s race significantly affected the subjective performance evaluations given to black employees in two large samples of civilian and military employers.⁹⁶ The researchers found that white employees received “virtually identical ratings” from both black and white supervisors.⁹⁷ But white supervisors’ evaluations of black employees were significantly lower than black supervisors’ evaluations of black employees.⁹⁸

Two other studies by John Dovidio and Samuel Gaertner highlight the changing nature of white racism. In both studies, white participants did not demonstrate traditional signs of overt bias towards blacks. Yet white participants consistently rated white candidates as superior to equally situated black candidates.

One study paired the participant, a white male undergraduate, with either a black or white male partner.⁹⁹ The researchers described the partner as either the participant’s subordinate or supervisor for the assigned task.¹⁰⁰ The researchers also informed the participant that his partner possessed either higher or lower intellectual ability than the participant with regard to the assigned task.¹⁰¹ Researchers discovered that the white male participants helped white male supervisors more frequently than they helped white male subordinates.¹⁰² But the white male participants did not help black male supervisors more frequently than they helped black male subordinates.¹⁰³ In order to account for this discrepancy

94. *Id.*

95. *See id.*

96. Paul R. Sackett & Cathy L.Z. DuBois, *Rater-Ratee Race Effects on Performance Evaluation*, 76 J. APP. PSYCHOL. 873 (1991).

97. *Id.* at 875.

98. *Id.* at 876 (finding that ratings of white supervisors were 0.02 to 0.10 of a standard deviation lower than those given by black supervisors).

99. Dovidio & Gaertner, *supra* note 7, at 19-20.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

in helping behavior, the researchers examined the white male participants' post-experiment evaluations of their partners.¹⁰⁴

Although participants' ratings indicated that they accepted high-ability white partners as being somewhat more intelligent than themselves, the ratings revealed that participants described even high-ability black partners as significantly less intelligent than themselves. Blacks may be regarded as intelligent, but not as intelligent as whites.¹⁰⁵

In the second study, participants reacted to a sketch of a black or white person quickly flashed onto a computer screen.¹⁰⁶ The screen then flashed up a trait, either positive or negative.¹⁰⁷ Researchers recorded both the traits identified and the reaction time of participants.¹⁰⁸ As expected, participants took longer to identify positive traits with the black computer sketches.¹⁰⁹ This result conformed to the findings of other research studies: whites' attitudes towards other whites are more positive than their attitudes towards blacks.¹¹⁰ But the researchers also found that white participants more easily associated negative traits with the black, as opposed to the white, computer image.¹¹¹ "There were a considerable number of participants who appeared low in prejudice on the self-report measure but who were racially biased on the measure of unconscious attitudes . . ."¹¹² Thus, measuring discrimination on the basis of professed racial prejudice significantly understates the impact of subtle and even unconscious racism.¹¹³

A similar pattern of subtle and, at times, unconscious sexism emerges in the studies on sex discrimination. As with race discrimination, some researchers suspect that professed beliefs about gender equality actually mask more subtle discriminatory beliefs about the sexes.¹¹⁴ In a recent study,

104. *Id.* at 20.

105. *Id.* at 20.

106. *See id.* at 15-16.

107. *Id.*

108. *Id.*

109. *Id.* at 16.

110. *See id.* at 8-14.

111. *Id.* at 16.

112. *Id.*

113. *See id.* at 13 ("[W]e believe that many of the nationwide surveys overrepresent the racially tolerant response.").

114. Janet K. Swim et al., *Sexism and Racism: Old-Fashioned and Modern Prejudices*, 68 J. PERS. & SOC. PSYCHOL. 199, 200 (1995). To test this theory, researchers developed two scales: one measuring "Old-Fashioned Sexism" and

researchers at Ohio State University asked participants to identify which of ninety-two different traits characterized a successful middle manager, a successful male middle manager, and a successful female middle manager.¹¹⁵ The researchers found that male and female participants identified similar traits as characteristic of the typical middle manager.¹¹⁶ Male and female participants "also largely agree[d] on descriptions of male managers . . . view[ing] male managers in a positive light."¹¹⁷ Only in the descriptions of female managers did significant disagreement arise between male and female participants.

The discrepancies between the descriptions of female managers given by male subjects and by female subjects are, in a word, extreme. Male subjects generally were less likely than female subjects to describe female managers as ambitious, authoritative, competent, direct, firm, intelligent, objective, sophisticated, or well informed. Male subjects were more likely than female subjects to describe female managers as bitter, likely to dawdle and procrastinate, deceitful, easily influenced, frivolous, hasty, nervous, passive, quarrelsome, reserved, shy, having a strong need for social acceptance, timid, uncertain, and vulgar.¹¹⁸

This research suggests that male supervisors, who carry negative beliefs about the typical female manager, will be less likely to evaluate *individual* female managers in a positive light. Individual male managers benefit from association with a positive archetype; association with a negative archetype harms individual female managers.

A much-publicized study presented to the National Bureau of Economic Research by Claudia Goldin, a Harvard economist, and Cecilia Rouse, of Princeton, reveals how subtle sex discrimination affects a woman's chances of landing a job with

the other "Modern Sexism." The Old-Fashioned Sexism scale contained statements such as "Women are generally not as smart as men." *Id.* app. B at 212. The Modern Sexism scale included statements like "Discrimination against women is no longer a problem in the United States." *Id.* They tested the scales on two large samples of college-age students and found that those who rated high on Modern Sexism "were more likely to overestimate the percentage of women in male-dominated jobs than were those who were low in Modern Sexism." *Id.* at 205. In addition, those who rated high on the Modern Sexism scale were more likely to attribute sex segregation in jobs to biological differences between the sexes, rather than to structural causes, such as discrimination. *Id.* at 208.

115. Deal & Stevenson, *supra* note 7, at 293.

116. *Id.* at 298.

117. *Id.*

118. *Id.*

a major orchestra.¹¹⁹ Goldin and Rouse studied the effect of blind auditions, in which a musician auditions behind a screen, on orchestral hiring of female musicians. "[W]hen musicians are judged purely on their merits, women get a huge break. Using blind auditions increases by 50% the chances that a woman will advance from the preliminary round and nearly triples her chances of being selected from among the finalists"¹²⁰ The Goldin and Rouse study demonstrates that sex, not merit *alone*, affects hiring decisions.

A *Prime-Time Live* broadcast from 1993 reveals the subtle ways in which men and women are steered into different jobs, which can then affect subsequent opportunities for promotion.¹²¹ *Prime-Time Live* followed one man and one woman, who had the same basic qualifications, as they applied for the same advertised positions. The differences in treatment were startling. "The man got offers for managerial positions paying up to \$500 per week. The woman got typing tests and information about receptionist and secretarial positions paying about \$240."¹²² Employers denied discriminating against the female applicant. Instead, they explained the differential job offers as an attempt to fit the applicant with the position: men are better suited to field management positions and women to receptionist positions.¹²³

Other studies confirm the anecdotal results of the *Prime-Time Live* experiment: gender stereotypes about occupations, in part, shape employment opportunity.¹²⁴ The Glass Ceiling Commission found that sex stereotyping of jobs "steer[s] [women] into jobs that limit possibilities for their career growth."¹²⁵ For example, a 1995 Food Marketing Institute study found that sex and race stereotyping affected the jobs

119. Joseph McLellan, *Do UnSeen Musicians Get Fairer Hearings? Professors See Link Between 'Blind' Auditions and Rise in Orchestras' Female Hires*, WASH. POST, July 13, 1997, at G16; Jonathan Marshall, "Blind" Auditions Putting Discrimination on Center Stage, SAN FRAN. CHRON., Feb. 10, 1997, at B1.

120. Marshall, *supra* note 119.

121. See RHODE, *supra* note 22, at 146.

122. *Id.*

123. *Id.*

124. See Judd & Oswald, *supra* note 7, at 474-75 (discussing various studies of the effect of sex and gender on employment desirability and reporting results of authors' hiring study showing interactive effects of sex and gender on employment desirability rating for different occupations).

125. GLASS CEILING REPORT, *supra* note 24, at 153.

offered to women and racial minorities.¹²⁶ Because the jobs traditionally occupied by women in the supermarket industry rarely lead to leadership positions, initial placement, based on sex stereotyping, affects women's long-term opportunity within the industry.¹²⁷

The Glass Ceiling Commission confirms these studies' findings:

Despite the growing concern of corporate leaders who consider diversity at the managerial and decisionmaking levels to be an important issue impacting their company's bottom line, significant barriers continue to exist at various levels within organizations and are experienced differently by different ethnic and racial groups. These barriers impede the advancement of qualified minorities and women.

....

... [I]n the private sector, equally qualified and similarly situated citizens are being denied equal access to advancement into senior-level management on the basis of gender, race, or ethnicity. At the highest levels of corporations the promise of reward for preparation and pursuit of excellence is not equally available to members of all groups.¹²⁸

The Commission concluded that merit *alone* does not account for the serious disparities in income and position in the American workplace. Instead, race and sex *still* play an important role in achieving success within the American workplace.

II. THE FEDERAL COURTS AND THE DEMISE OF THE CIRCUMSTANTIAL EVIDENCE CASE

A. INTRODUCTION

Suppose that Elena, a black woman, applies for a position as a bank teller. Elena is qualified for the job, but the bank offers the position to Fiona, a white woman. If Elena suspects that her race played a role in the bank's employment decision, she must fit her claim into one of the legally recognized paradigms for proving race discrimination. For plaintiffs who are fired or denied a job or promotion, that usually means

126. Stuart Silverstein, *In Supermarkets' Executive Department, A Lack of Variety*, L.A. TIMES, May 2, 1999, at C1.

127. *Id.* ("Women usually work in cashier, office and customer service roles, and in specialty departments—which seldom lead to major leadership opportunities." (quoting 1995 Food Marketing Institute report)).

128. GLASS CEILING REPORT, *supra* note 24, at 9-11.

asserting a claim using disparate treatment rather than disparate impact analysis.¹²⁹ A plaintiff can make out a case of disparate treatment using either direct¹³⁰ or circumstantial evidence of discrimination.¹³¹

129. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 425 (1999) ("[I]ndividual claims of disparate treatment dominate employment discrimination actions."). Disparate impact analysis "inherently requires that plaintiffs or their attorneys look to aggregate hiring or firing statistics, which are not available to potential plaintiffs in the ordinary course of events." Ian Ayres & Peter Siegelman, *Symposium: The Changing Workplace: The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1494 (1996). Moreover, even in disparate treatment cases based on circumstantial evidence, courts reject statistical samples that are too small, see, e.g., *Kelley v. Goodyear Tire & Rubber Co.*, 45 F. Supp. 2d 888, 893 (D. Kan. 1999) (granting summary judgment and rejecting the plaintiff's statistical evidence concerning the eight applicants for position as probative of race discrimination because "a sample of eight is too small to provide reliable results" (citations omitted)); *Harris v. Parker Hannifin Corp.*, No. 1:97-CV-254-B-D, 1998 U.S. Dist. LEXIS 13526, at *9 (N.D. Miss. Aug. 24, 1998) (granting summary judgment to the employer and rejecting the plaintiff's statistical evidence because the sample was "too small to be relied upon as evidence of pretext" (citation omitted)), or not based on "similarly situated" employees, see, e.g., *Kennedy v. Quaker Oats Co.*, No. 97-CV-72094-DT, 1998 U.S. Dist. LEXIS 15340, at *26-29 (E.D. Mich. Aug. 17, 1998) (granting summary judgment on an age discrimination claim and rejecting statistical evidence that would be presented by the terminated employee's expert because the expert's statistical analysis did not confine itself to "similarly situated" employees who were terminated). Thus, it may prove impossible for plaintiffs applying for jobs in small companies or for high-level positions, where the size of the relevant qualified pool is small, to construct a successful disparate impact case even if they do have access to management firing, hiring, and promotion statistics.

130. Direct evidence cases include those in which the sole motive for the employment decision was discrimination and mixed-motive cases in which discrimination was a motivating factor in the employment decision. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REVISED ENFORCEMENT GUIDANCE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY § III.B. (1992) [hereinafter EEOC GUIDANCE].

131. See, e.g., *Bell v. EPA*, No. 97 C 6349, 1999 U.S. Dist. LEXIS 16445, at *7-8 (N.D. Ill. Oct. 14, 1999) ("To avoid summary judgment, Plaintiffs [can] present either direct evidence of discrimination, such as a 'smoking gun' admission, or follow the familiar three-step burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*." (citations omitted)); *Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896, 901-02 (N.D. Iowa Aug. 4, 1999) (holding that plaintiff can prove employment discrimination using either direct or indirect evidence of discrimination); *Hagen v. Beauticontrol Cosmetics, Inc.*, No. 3:98-CV-1199-D, 1999 U.S. Dist. LEXIS 9998, at *13-14 (N.D. Tex. June 28, 1999) ("Adducing direct evidence of discrimination is not the only way for [the plaintiff] to avoid summary judgment. Because direct evidence of discrimination is so rare, courts have devised an indirect or inferential method of proving invidious discrimination." (citation omitted)).

Suppose that the bank informs Elena that she did not receive the job because "blacks have weak mathematical skills." This comment provides direct evidence of discrimination: the bank's bad intent and a causal connection to the prohibited activity, failure to hire based on race.¹³² But direct evidence of discrimination is rare.¹³³ Employers seldom provide plaintiffs

Some courts state that plaintiffs can make out a disparate treatment case using direct, circumstantial, or statistical evidence of discrimination. See *Lockett v. Fort James Corp.*, No. 98-0612-CB-M, 1999 U.S. Dist. LEXIS 17017, at *13 (S.D. Ala. Oct. 4, 1999); *Ayan v. Heisinger*, No. C97-4525 MHP, 1999 U.S. Dist. LEXIS 3810, at *11 (N.D. Cal. Mar. 25, 1999). But the courts treat statistical evidence as a subset of circumstantial evidence, employing the *McDonnell Douglas* framework in any disparate treatment case in which the plaintiff lacks direct evidence of discrimination.

132. See EEOC GUIDANCE, *supra* note 130, § III.A. ("Direct evidence of discriminatory motive may be any written or verbal policy or statement made by a[n employer] that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action."); see also *Haas v. Betz Labs., Inc.*, No. 97-56560, 1999 U.S. App. LEXIS 14102, at *3 (9th Cir. June 23, 1999) (holding that, in an age discrimination case, plaintiff Haas showed pretext directly by offering statements by the decision maker that he preferred hiring younger workers because they could "work longer hours" and "[had] some desire for earning money, such as saving to buy a house"); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir. 1998) ("Direct evidence of discriminatory intent in pregnancy discrimination cases generally is in the form of an admission by a supervisor or decision maker that the employee was suspended because she was pregnant." (citation omitted)), *cert. denied*, 525 U.S. 870 (1998); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998) ("Direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." (quoting *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990))); *Hagen*, 1999 U.S. Dist. LEXIS 9998, at *8-9 ("Direct evidence is evidence that, without requiring a fact finder to make any inferences or presumptions, proves that a person engaged in unlawful discrimination." (citations omitted)).

133. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Rutherford v. Harris County*, 197 F.3d 173, 184 n.11 (5th Cir. 1999) ("Had this been the rare case in which direct evidence of discrimination was available, Rutherford had the option of relying instead on such proof."); *Gregory v. Chrysler Corp.*, No. 97-4442, 1999 U.S. App. LEXIS 8025, at *16 (6th Cir. Apr. 21, 1999) (Jones, J., dissenting) ("[I]t is the rare case that presents direct evidence of discrimination."); *Douglas v. Dyn McDermott Petroleum Operations Co.*, 163 F.3d 223, 232 (5th Cir. 1998) (*per curiam*) (Dennis, J., dissenting) ("Because direct evidence of discrimination is rare, a plaintiff in a discrimination case must ordinarily use circumstantial evidence to satisfy her burden of persuasion." (citation omitted)); *Washington v. Honeywell, Inc.*, No. 94-55590, 1996 U.S. App. LEXIS 4604, at *7 (9th Cir. Feb. 28, 1996) ("Intent to discriminate in today's world is not openly expressed."); *Olivera v. Nestle P.R., Inc.*, 922 F.2d 43, 50 (1st Cir. 1990)

with the smoking gun necessary to prove that discrimination motivated the employer's failure to hire or promote. Because of the difficulty of producing direct evidence of discrimination, the Supreme Court created the burden-shifting framework of *McDonnell Douglas Corp. v. Green*,¹³⁴ which allows a plaintiff to prove discrimination using circumstantial evidence.¹³⁵ Yet, while the federal courts pay lip service to the difficulty of obtaining direct evidence of discrimination, they continue to erode the ability of plaintiffs to construct successful cases of discrimination on the basis of circumstantial evidence alone.

The research by social scientists, management specialists, academic institutions, and government agencies shows that discrimination in today's workplace operates in subtle ways that often are difficult to identify because they fail to fit traditional beliefs about how discrimination operates.¹³⁶ Unfortunately, rather than adapting the flexible *McDonnell Douglas* paradigm to take account of the changing nature of

("Although there was no smoking-gun evidence, it has been recognized that in discrimination cases direct evidence of bias is rare."); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987) ("It is rare that direct evidence of discrimination exists."); see also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 214 (1993).

134. 411 U.S. 792 (1973).

135. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Rutherford*, 197 F.3d at 180 n.4 ("[A] plaintiff can rely on direct evidence, but it is rare in discrimination cases, [and] a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion." (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.1996) (en banc)); *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 507 (3d Cir. 1996) ("But our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination." (citations omitted)); *Gries v. Zimmer, Inc.*, No. 90-2430, 1991 U.S. App. LEXIS 16729, at *9 (4th Cir. July 29, 1991) (stating that the *McDonnell Douglas* framework is available because of the difficulty of proving discriminatory intent); *Forsberg v. Pacific N.W. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (stating that courts may infer discrimination from circumstantial evidence because direct evidence of discrimination is difficult to obtain); *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) (stating that even employers who knowingly discriminate may leave no records and so plaintiffs can prove discrimination indirectly by eliminating all lawful reasons for the challenged employment decision); *Lockett v. Fort James Corp.*, No. 98-0612-CB-M 1999, U.S. Dist. LEXIS 17017, at *13 (S.D. Ala. Oct. 4, 1999) (stating that the burden-shifting framework was created because of the difficulty of producing direct evidence of discrimination).

136. See *supra* Part I.C. (citing such research).

discrimination, many federal courts are actually doing the opposite: narrowing the legal definition of actionable discrimination.

This trend toward narrowing the legal definition of actionable discrimination is not occurring consistently across federal district courts or across circuits. On one end of the spectrum are those courts that ignore evidence of subtle discrimination. For example, some federal courts have narrowed the inquiry into the legitimacy of the employer's hiring, promotion, or termination decision, concluding that the logic or reasonableness of the reasons for the challenged employment action are not relevant to the legitimacy inquiry.¹³⁷ Yet an illogical or irrational decision may suggest discrimination, especially in a culture that purports to reward on the basis of merit. By failing to examine the logic of the challenged employment decision, these courts fail to acknowledge the more subtle ways that discrimination operates in today's workplace. On the other end of the spectrum, however, are those circuits employing the "honest belief" standard¹³⁸ and, until recently, the "pretext-plus" requirement in circumstantial evidence cases.¹³⁹ These circuits raise the evidentiary bar so high for plaintiffs that they essentially remake the circumstantial evidence case into one requiring direct evidence of discrimination.

The end result is that plaintiffs are finding it increasingly difficult to prevail in employment discrimination actions when they have only circumstantial evidence of discrimination. The alarming number of circumstantial evidence cases disposed of on summary judgment or on motions for judgment as a matter of law confirms this trend.¹⁴⁰ As the courts restrict their

137. See *infra* Part II.B. (discussing the erosion of the legitimacy requirement).

138. See *infra* Part II.E. (discussing this standard).

139. See *infra* Part II.F. (discussing this requirement).

140. The following figures are based on 173 federal district court and 85 court of appeals cases, or a total of 258 federal cases. For an explanation of how I arrived at this pool of cases, see *supra* note 12.

In 137 of the 173 federal district court cases, the trial court granted summary judgment or judgment as a matter of law on one or more of plaintiff's race, sex, or retaliation claims. In 60 of 85 court of appeals cases, the appellate court affirmed the trial court's order granting summary judgment or judgment as a matter of law on one or more of the plaintiff's race, sex, or retaliation claims, or reversed a trial court verdict in favor of the plaintiff. (These figures include cases in which the court granted partial summary judgment in favor of the employer, such as granting summary

oversight function, they legitimize current employment practices and limit the accountability of employers for more subtle forms of discrimination, even as the research indicates that greater, not less, government oversight ensures more fair outcomes in the workplace.¹⁴¹ Thus, by narrowing the definition of actionable discrimination, the federal courts reinforce the prevailing belief that merit, not subtle or systemic discrimination, accounts for the significant disparities in pay, position, and employment status between blacks and whites, and men and women, in today's workplace.

B. THE EROSION OF THE LEGITIMACY REQUIREMENT

Under the legal framework for proving intentional discrimination by circumstantial evidence, once the plaintiff makes out a *prima facie* case of employment discrimination, the employer must produce a legitimate, nondiscriminatory reason for the challenged employment decision.¹⁴² If the employer meets this burden of production,¹⁴³ the plaintiff may still

judgment on a claim of race discrimination but denying a motion for summary judgment on a corresponding claim of retaliation.)

Thus, in 79% of the disparate treatment cases involving claims of race, sex, retaliation, or some combination of these three claims, the federal district court granted summary judgment or judgment as a matter of law to the employer. In 71% of the disparate treatment cases involving claims of race, sex, retaliation, or some combination of these three claims, the court of appeals either affirmed the trial court order granting summary judgment or judgment as a matter of law in favor of the employer, or reversed a trial court verdict in favor of the plaintiff. Counting both the federal district court and court of appeals cases, then, employers prevailed on summary judgment, judgment as a matter of law, or on appeal with a jury reversal in 197 (76%) of the 258 cases reported.

141. See Perry et al., *supra* note 48, at 792 ("Organizations whose hiring and employment practices are exposed to scrutiny by powerful external constituents appear to have lower levels of gender segregation than organizations whose employment practices are not subject to external scrutiny."); see also *id.* at 802 ("Edelman (1992) has argued that one reason for the persistence of gender segregation is that, in many organizations, affirmative action offices are largely a symbolic response to legal pressures and lack the power to change decision makers' actions or cognitions." (citation omitted)); Reskin et al., *supra* note 65, at 342 (summarizing studies demonstrating that compliance with federal affirmative action guidelines and oversight by enforcement bodies increases the representation of women and racial minorities in the work force).

142. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

143. Under the legal framework for circumstantial evidence cases, the employer need only produce a legitimate, nondiscriminatory reason, not persuade the court that the proffered reason actually motivated the challenged employment decision. *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248,

prevail if she can demonstrate that the employer's articulated reason is a pretext for discrimination.¹⁴⁴ The plaintiff can demonstrate pretext in one of two ways. By "directly . . . persuading the court that a discriminatory reason more likely motivated the employer,"¹⁴⁵ she can demonstrate that the employer's legitimate, nondiscriminatory reason was, in fact, discriminatory. Or, the plaintiff can discredit the legitimacy of the employer's legitimate, nondiscriminatory reason "indirectly by showing that the employer's proffered explanation is unworthy of credence."¹⁴⁶ This latter method of proof involves creating an inference of discrimination by weaving together evidence that casts doubt on the legitimacy of the reasons offered by the employer for the challenged employment decision.

The plaintiff can discredit the legitimacy of the employer's legitimate, nondiscriminatory reason in two ways. She can offer evidence that the employer's reason is a lie or factually false, which suggests that the employer's reason is "unworthy of credence" because it is not authentic or genuine. But, if a plaintiff can show that the employer's reason makes no sense, this, too, suggests that the reason is "unworthy of credence," not because it is factually false, but because it is not reasonable or logical.¹⁴⁷ Both methods of proof are consistent with the

254-55 (1981).

144. Until the recent U.S. Supreme Court decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000), there was a split in the circuits about the pretext analysis. Some circuits required plaintiffs only to prove pretext, while others were pretext-plus circuits. See *id.* at 2104-05; see also *infra* note 307 and accompanying text. In *Reeves*, a unanimous decision, the Supreme Court held that a factfinder may—but is not required to—find employment discrimination on the basis of the plaintiff's prima facie case coupled with evidence of pretext. See *Reeves*, 120 S. Ct. at 2109. Thus, the Court rejected the analysis followed by the pretext-plus circuits, which required plaintiffs not only to prove that the employer's legitimate, nondiscriminatory reason was pretextual but also to prove that the real reason for the challenged employment decision was discrimination. See *infra* Part II.F.

145. *Burdine*, 450 U.S. at 256.

146. *Id.*

147. I use the term logical or valid in two ways. The first is a more narrow reading, in which the reason proffered by the employer is one that a rational employer might consider in an employment decision. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.40c(3)(a), at 334 (1988) ("Legitimate" therefore presupposes that the reason be one which rational employers would utilize in taking personnel actions. Stated conversely, arbitrary, idiosyncratic reasons are not 'legitimate' because they would not support an inference that such a 'reason,' rather than illegal considerations, motivated the employer.")

definition of "legitimate" as "authentic," "genuine," "reasonable," or "based on logical reasoning,"¹⁴⁸ and with the Supreme Court's "unworthy of credence" standard from *Texas Department of Community Affairs v. Burdine*.¹⁴⁹

Increasingly, however, the federal courts have narrowed the definition of "legitimate" to mean "authentic" or "genuine," disregarding as legally irrelevant evidence showing that the employer's articulated reason is invalid or illogical.¹⁵⁰ As a

(footnote omitted)). The second reading is broader and applies to cases in which the individual hiring or promotion criteria are valid. Yet, in the aggregate, the employer's decision appears illogical, such as a preference for a candidate who excels on only one out of four relevant hiring criteria. See *Simms v. Oklahoma*, 165 F.3d 1321, 1328-30 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 53 (1999).

148. THE AMERICAN HERITAGE DICTIONARY 723 (2d ed. 1985); see also RANDOM HOUSE WEBSTER'S 775 (1991).

149. 450 U.S. 248 (1981).

150. See, e.g., *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) ("Thus, the court's role in this case was not to determine if United's hiring decisions were wise or fair, but rather, in the context of Ms. Bullington's disparate treatment claim, if those decisions were motivated by discriminatory animus."); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 22 (1st Cir. 1999) ("As this court has previously explained, '[c]ourts may not sit as super personnel departments, assessing the merits—or even the rationality of employers' nondiscriminatory business decisions.'" (citation omitted)); *Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1109 (8th Cir. 1998) ("[T]he employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." (citations omitted)); *Antle v. Blue Cross & Blue Shield, Inc.*, 75 F. Supp. 2d 1248, 1259 (D. Kan. 1999) ("When an employer articulates a non-discriminatory reason for an employment decision, 'it is not our province to decide whether that reason was wise, fair, or even correct' [T]he pertinent question is not whether the employer was correct in its assessment, but whether the employer's stated belief was genuine." (citations omitted)); *Byrnie v. Town of Cromwell Pub. Schs.*, 73 F. Supp. 2d 204, 214 (D. Conn. 1999) ("Title VII and the ADEA are not violated just because an employer made an erroneous, poor, or illogical business decision." (citation omitted)); *Bickerstaff v. Nordstrom, Inc.*, 48 F. Supp. 2d 790, 800 (N.D. Ill. 1999) (stating that an employer's reasons for the challenged employment decision "need not be compelling; they can be 'foolish or trivial or even baseless'" (citation omitted)); *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 398 (S.D.N.Y. 1999) ("Accordingly, to 'defeat a properly supported motion for summary judgment, plaintiff must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more than likely the employee's [race] was the real reason for discharge.'" (citation omitted)); *Ichile v. City of Chicago*, No. 95-C-3507, 1998 U.S. Dist. LEXIS 13764, at *27 (N.D. Ill. Aug. 31, 1998) ("[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . he must show that the explanation given is 'a phony reason.'")

result, a plaintiff must demonstrate that the employer's proffered reasons are factually false, which often is more difficult, especially when subjective criteria are involved, than demonstrating that the employer's reasons are illogical or that the challenged employment decision, based on relative qualifications, makes no sense. Nothing in the word "legitimate" or the phrase "unworthy of credence" necessitates this restrictive definition.

*Simms v. Oklahoma*¹⁵¹ illustrates how this narrow reading of the legitimacy requirement significantly disadvantages plaintiffs whose pretext argument relies, at least in part, on the logic of the challenged employment decision. *Simms* involved a race discrimination claim brought by Cedric Simms, a black man, against his employer, the Oklahoma Department of Mental Health and Substance Abuse (Department) for failing to promote him to the position of Fire and Safety Officer Supervisor.¹⁵² The Department promoted Bruce Valley, a white employee, citing Valley's "substantially greater supervisory experience."¹⁵³ The employer considered at least four criteria in its job selection process: (1) education as a firefighter, (2) training as a firefighter, (3) interview scores, and (4) supervisory experience.¹⁵⁴ Simms had more education and greater training as a firefighter than did Valley.¹⁵⁵ On the first round of interviews, Simms scored slightly higher than did Valley.¹⁵⁶ The employer conducted a second round of interviews, after which Valley was selected for the job.¹⁵⁷

On two of the four criteria, Simms had better qualifications than Valley. On the third criterion—the interview—the candidates were comparable.¹⁵⁸ Valley, however, had substantially more supervisory experience than did Simms.¹⁵⁹ Valley's experience, however, was in the construction industry,

(citation omitted)).

151. 165 F.3d 1321 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 53 (1999).

152. Simms had filed a prior lawsuit against his employer for failure to promote him to the position of Fire and Safety Officer II. The suit was settled, and Simms was promoted. *Id.* at 1324.

153. *Id.* at 1330.

154. *Id.* at 1324-25, 1329-30.

155. *Id.* at 1330.

156. *Id.* at 1329 n.4.

157. *Id.* at 1324-25.

158. Simms scored higher on the first round of interviews, while Valley scored higher on the second round. *See id.*

159. *Id.* at 1330.

and Simms had been Valley's supervisor when the Department posted the position for Fire and Safety Officer Supervisor.¹⁶⁰

Because the Department relied on Valley's supervisory experience in its promotion decision, Simms had to demonstrate that that reason was "unworthy of belief."¹⁶¹ Simms could not survive summary judgment simply by questioning, without more, the Department's reliance on the one qualification on which Valley excelled.¹⁶² Simms offered other evidence, including his prior successful claim of race discrimination against the Department, to show that the Department's real reason for failing to promote him was his race.¹⁶³ The trial court, however, granted summary judgment in favor of the employer, and the Tenth Circuit affirmed.¹⁶⁴

The *Simms* decision illustrates the weakness of the federal courts' narrow reading of the term "legitimate." Simms demonstrated that on two out of four job-related criteria he possessed qualifications superior to those held by the candidate selected.¹⁶⁵ He and the other candidate were comparable on the interview, with Simms receiving a better score in the first round and the other candidate scoring higher on the second round of interviews.¹⁶⁶ The only criterion on which the chosen candidate excelled was supervisory experience. But Simms had supervisory experience; in fact, he was the chosen candidate's supervisor at the time of the promotion decision.¹⁶⁷

Simms also presented evidence of possible retaliation by his employer. Simms had successfully settled a prior race discrimination claim against the employer.¹⁶⁸ Thus, the employer had reason to retaliate. When coupled with the

160. *Id.* at 1324.

161. *Id.* at 1329.

162. *See infra* text accompanying notes 170-76. (discussing how bias can be buried in an employer's preference for a particular qualification).

163. *See Simms*, 165 F.3d at 1329-31.

164. *Id.* at 1331. Like many of the opinions discussed in this Article, the Tenth Circuit's decision is the result of a variety of factors. To begin with, the Tenth Circuit failed to appreciate the subtle ways in which retaliation operates and, thus, failed to examine the logic or validity of the employer's promotion decision. In addition, the court required Simms to prove that he was clearly better qualified than Valley, the candidate promoted. *See id.* at 1330. This raised the evidentiary bar for Simms, making it much more difficult to survive summary judgment.

165. *Id.* at 1329-30.

166. *Id.* at 1329.

167. *Id.* at 1324.

168. *Id.*

employer's decision to favor a white candidate whose job-related qualifications exceeded Simms on only one out of four relevant job criteria, the court should have denied the employer's motion for summary judgment based on the legitimacy of the challenged employment decision.

Narrowing the legitimacy requirement to proof that the employer's reason is false or phony means that the courts will miss the more prevalent, subtle forms of discrimination that predominate in today's market.¹⁶⁹ *Simms* illustrates the problem.

First, suppose that the employer in *Simms* was not lying about the need for supervisory experience. Does that make the employer's decision legitimate? The real issue raised by the *Simms* case is whether subtle and unspoken bias affected the employer's decision to emphasize supervisory experience, the one qualification on which the white candidate excelled, as opposed to other job criteria—education and training—on which Simms excelled. This is an important distinction because employers often make hiring and promotion decisions on the basis of multiple criteria, some objective and others subjective. When an employer has multiple criteria for hiring, one candidate rarely emerges as superior on all dimensions.¹⁷⁰ Instead, effective employment procedures produce several fully qualified candidates, each of whom possesses different strengths. The Society for Human Resource Management¹⁷¹ acknowledged this fact in its amicus brief before the Supreme Court in *Johnson v. Transportation Agency*.¹⁷² "[A] standard tenet of personnel administration [is] that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection."¹⁷³ Therefore, if an employer uses multiple criteria for hiring and promotion decisions, the employer generally can point to at least one job criterion on which the non-selected candidate was weaker,

169. For a discussion of subtle bias, see *supra* Part I.C.

170. See, e.g., *supra* text accompanying notes 151-64.

171. The organization formerly was known as the American Society for Personnel Administration. My thanks to Dr. Rebecca Luzadis for making me aware of this change in nomenclature.

172. 480 U.S. 616 (1987).

173. Brief for the American Society for Personnel Administration as Amicus Curiae 9, *quoted in Johnson*, 480 U.S. at 641 n.17.

thereby asserting the superior qualifications of the candidate they select as the legitimate, nondiscriminatory reason justifying their employment decision.¹⁷⁴

For instance, an employer . . . might subtly re-evaluate the most important qualifications for a job, depending on the race of different applicants. If, say, a white applicant had broader experience and a black applicant had more up-to-date training, the employer would decide that experience was more important; if the white applicant had more-recent training and the black more experience, the employer would decide that experience was less important. Thus, the [employer] would find a way to hire the white applicant without admitting to himself or herself that racial bias played a role in the choice.¹⁷⁵

174. For cases in which the employer justified the challenged employment decision on the grounds of the superior qualifications of the candidate selected, see *Islar v. Ourisman Chevrolet Co.*, No. 97-2641, No. 98-1185, 1999 U.S. App. LEXIS 538, at *6 (4th Cir. Jan. 15, 1999); *Arrington v. Cobb County*, 139 F.3d 865, 869-70 (11th Cir. 1998); *Ballor v. Alcona County Rd. Comm'n*, No. 97-1413, 1998 U.S. App. LEXIS 10519, at *5 (6th Cir. May 20, 1998); *Nichols v. Grocer*, 138 F.3d 563, 565 (5th Cir. 1998); *Florence v. United States Vanadium Corp.*, No. 97-7443, 1998 U.S. App. LEXIS 22579, at *7 (2d Cir. Feb. 5, 1998); *Paulsboe v. Farnam Cos.*, No. 97-7003, 1997 U.S. App. LEXIS 19990, at *5 (10th Cir. Aug. 1, 1997); *Bray v. Marriott Hotels*, 110 F.3d 986, 990 (3d Cir. 1997); *Johnson v. Rubin*, No. 95-55456, 1997 U.S. App. LEXIS 764, at *8 (9th Cir. Jan. 13, 1997); *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 141 (5th Cir. 1996); *Ellis v. Blood Sys., Inc.*, No. 95-2114, 1996 U.S. App. LEXIS 15643, at *4-5 (7th Cir. June 25, 1996).

175. Dovidio, *supra* note 77; see *Nichols*, 138 F.3d at 568. In reversing the jury verdict for the plaintiff on her sex discrimination claim for failure to promote, the Fifth Circuit rejected the plaintiff's argument that her employer had changed the ranking of criteria it used to fill the challenged position, noting that "[t]he promotion decision is a dynamic one, and the relative importance placed on various selection criteria cannot be expected to remain fixed and unyielding." *Id.*; see also *Moon v. Tennessee*, No. 96-5513, 1997 U.S. App. LEXIS 17479, at *4 (6th Cir. July 9, 1997) (affirming the trial court verdict in favor of the employer on the plaintiff's race discrimination claim for failure to promote, even though the employer admitted that its "selection process was unusual," and "a strict reading of the qualifications suggest[ed] that [the] degree and biology credits [of the candidate selected] [did] not satisfy the minimum standards set by Tennessee for a Microbiologist III"); *Wright v. Tultex Corp.*, No. 97-0060-D, 1998 U.S. Dist. LEXIS 20383, at *14 (W.D. Va. Dec. 14, 1998) (granting summary judgment for the employer even though its job notice stated "college degree preferred," which the employer subsequently explained meant a four-year degree, not the associate's degree held by the white female plaintiff); *Jennings v. Nat'l R.R. Passenger Corp.*, No. 97 C 6385, 1998 U.S. Dist. LEXIS 12004, at *33 n.6 (N.D. Ill. July 30, 1998) ("Jennings' basic argument that an employer is bound by the generalized description of minimal qualifications contained in the job posting is baseless."). *But see Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 643 (11th Cir. 1998) ("[S]hoddy drafting does not give an employer license to redefine job requirements on the fly in an attempt to win summary judgment.").

Therefore, unless a federal court examines the logic of a challenged employment decision, subtle bias can almost always be buried in at least one objective, or even subjective, job criterion on which the selected candidate excelled.¹⁷⁶

Second, focusing on the employer's intent, that is, whether the employer lied, does not address the fact that prejudice and bias often affect perception, and perception shapes employment outcomes. The research indicates that white candidates, and white male candidates in particular, are perceived as more qualified than black and female candidates, even when objective qualifications are held constant.¹⁷⁷ For example, when faced with an equally qualified white and black candidate, white evaluators score the white candidate more favorably than the black candidate.¹⁷⁸ Goldin and Rouse's study indicates that blind auditions benefit female musicians because it removes consideration of their sex from evaluation of

176. See, e.g., *infra* text accompanying notes 279-88. The problem is exacerbated by the trend in some federal courts toward granting summary judgment or even reversing a trial court verdict in favor of the plaintiff when the plaintiff fails to discount each of the employer's legitimate, nondiscriminatory reasons. This provides an employer with an incentive to provide multiple reasons for its decision. Thus, even when a plaintiff can demonstrate that an employer lied about two out of three reasons offered for its promotion decision, the jury is not allowed to draw an inference that the employer also may have lied about the third reason provided for the challenged employment decision. See *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539-43 (11th Cir. 1997) (reversing a jury verdict in favor of the plaintiff on his race discrimination claim because he failed to refute one of the three legitimate, nondiscriminatory reasons offered by his employer for its promotion decision), *cert. denied*, 522 U.S. 1045 (1998); see also *Scott v. Univ. of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) (stating, in an age discrimination suit, that "to give rise to . . . an inference of discrimination, the [plaintiff] must provide some evidence, direct or circumstantial, to rebut each of the employer's proffered reasons"); *Kelley v. Goodyear Tire & Rubber Co.*, 45 F. Supp. 2d 888, 893 (D. Kan. 1999) (citing with approval a Seventh Circuit case that stated that the plaintiff must provide evidence challenging each of the employer's legitimate, nondiscriminatory reasons); *Blevins v. Heilig-Meyers Corp.*, 52 F. Supp. 2d 1337, 1348 (M.D. Ala. 1998) ("However, in order to survive summary judgment, the plaintiff must show that 'there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions.'" (emphasis in original) (citation omitted)), *aff'd*, 184 F.3d 825 (11th Cir. 1999); *Eaton v. Hill*, No. 3:97-CV-124RP, 1998 U.S. Dist. LEXIS 17909, at *19 (N.D. Ind. Sept. 28, 1998) ("Based upon the evidence presented, the court must conclude that even if [the plaintiff] had shown pretext on the issue of attendance, the [employer] would still be entitled to summary judgment based on the additional reasons it asserted for not promoting [the plaintiff].").

177. See *supra* Part I.C.

178. See *supra* text accompanying notes 88-95.

their merit as musicians.¹⁷⁹ A recent study by Patricia Devine and Andrew Elliot reveals that a high percentage of whites identify laziness, low intelligence, and lack of education as qualities associated with the stereotype of the black American.¹⁸⁰ Devine and Elliot's research shows that "stereotypes can be automatically activated by the perception of social stimuli (e.g., exemplars of the group, group labels), resulting in prejudice-like feelings, thoughts, and behaviors for high- and low-prejudiced individuals alike."¹⁸¹ These stereotypes and cultural beliefs may shape the way in which qualified black and female candidates are evaluated.¹⁸² While qualified for the position, they rarely are "better qualified" than the white or white male candidate for the job.

As a result, invoking the language of "best qualified" should not insulate employment decisions from scrutiny by the federal courts. As the Third Circuit noted in *Bray v. Marriott Hotels*,¹⁸³ Title VII also should address the fact that bias can actually shape employer perceptions such that the "best qualified" candidate is never black.

[Title VII] must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the "best" candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the "best" candidate, was [not] the result of conscious racial bias. Thus, the issue here, is not merely whether [the employer] was seeking the "best" candidate but whether a reasonable factfinder could conclude that [the plaintiff] was not deemed the best because she is Black.

179. See *supra* text accompanying notes 119-20.

180. See Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1146 tbl.3 (1995). Little discrepancy existed in the ability of low-prejudice versus high-prejudice whites to identify the elements of the stereotype. See *id.* at 1147. For example, 78% of low-prejudice whites and 82% of high-prejudice whites identified laziness as a stereotypical black trait. See *id.* at 1146 tbl.3.

181. *Id.* at 1147.

182. See, e.g., *Ferron v. West*, 10 F. Supp. 2d 1363, 1367, 1371 (S.D. Ga. 1998) (granting summary judgment for the employer on a failure-to-promote claim based on race, despite the plaintiff's greater expertise in job-related skill—firefighting—and more federal work experience than other candidates, based on white supervisors' evaluations of plaintiff as lazy and lacking the initiative and motivation of white candidates); cf. Devine & Elliot, *supra* note 180, at 1148-49 (stating that racial stereotypes are "deeply embedded in the cultural fabric of our nation").

183. 110 F.3d 986 (3d Cir. 1997).

Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.¹⁸⁴

Finally, requiring the plaintiff to demonstrate that the employer's legitimate, nondiscriminatory reason is phony, false, or a lie is especially problematic in cases involving subjective employment criteria.¹⁸⁵ Subjective evaluation criteria provide employers with "deplorably fertile grounds" for "disguis[ing] their personal biases."¹⁸⁶ Absent an admission by the employer, how does a plaintiff effectively dispute the employer's contention that the selected candidate performed better in the interview than did the plaintiff?

The reluctance on the part of many federal courts to examine the logic of employers' hiring, firing, and promotion decisions virtually ensures that subtle discrimination will continue to influence employment decisions. Limiting the ability of a plaintiff to challenge the reasonableness or logic of an employer's decision means that the plaintiff needs either direct evidence of discriminatory intent or proof that the employer lied about the reasons it offered for the challenged employment decision. Both forms of proof are difficult to come by in today's market. Moreover, requiring such evidence at the summary judgment stage¹⁸⁷ means that fewer plaintiffs will be

184. *Id.* at 993.

185. *See, e.g.,* Carter v. Three Springs Residential Treatment, 132 F.3d 635, 644 (11th Cir. 1998) ("While there is nothing inherently wrong with allowing decision makers to base decisions on subjective criteria, we have found that 'subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination.'" (citation omitted)); Hartley v. CSX Transp., Inc., No. 94-4257, 1996 U.S. App. LEXIS 25299, at *11-12 (6th Cir. Aug. 28, 1996) (Jones, J., concurring) ("While subjective selection procedures are not illegal per se, . . . they have been found to 'provide a ready mechanism for discrimination, permitting . . . prejudice to affect and often control promotion and hiring decisions.'" (alteration in original) (citations omitted)); Lane v. Ogden Entm't, Inc., 13 F. Supp. 2d 1261, 1277 (M.D. Ala. 1998) ("Where subjectivity on the part of differently-raced supervisors is the basis of job requirements, the Eleventh Circuit has recognized that there is a 'ready mechanism for racial discrimination.'" (citation omitted)).

186. Hartley, 1996 U.S. App. LEXIS 25299, at *13 (Jones, J., concurring); *see also supra* text accompanying notes 88-128 (discussing the subtle influence of race and sex on the evaluation of performance).

187. *See, e.g.,* Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999) (affirming an order granting summary judgment on the white female plaintiff's disparate treatment claims of sex and age discrimination and deferring to the employer's explanation that the plaintiff had performed poorly in the interview, even though the plaintiff offered statistical evidence that women fared significantly less well in the interview process than did men, and rejecting the plaintiff's claim that she had better objective qualifications than

able to obtain a trial on the merits. This, in turn, limits the definition of actionable discrimination to more overt forms of

other candidates selected, because “[a]t most, the seven other candidates were similarly qualified”); *Bell v. EPA*, No. 97 C 6349, 1999 U.S. Dist. LEXIS 16445 (N.D. Ill. Oct. 15, 1999) (granting summary judgment to the employer on four plaintiffs’ race, national origin, and age discrimination claims, even though the plaintiffs had objectively better qualifications than the four white candidates selected for promotion to GS-13 positions, the plaintiffs offered a memorandum drafted by one of the four selecting officials in which he said that two of the four plaintiffs were superior to some of the selected white candidates, and the plaintiffs offered evidence of inconsistent statements made by one of the selecting officials and inconsistent statements about the existence of a consensus among the selecting officials as to which candidates were best qualified for promotion); *Booker v. Dayton Hudson Corp.*, No. 98 C 0737, 1999 U.S. Dist. LEXIS 16241 (N.D. Ill. Oct. 5, 1999) (granting summary judgment to the employer on a white female plaintiffs claim that pregnancy and sex discrimination motivated the employer’s decision to terminate her and deferring to the employer’s explanation that it had done so because the plaintiff had violated company policy and was held to a higher standard as a supervisor, even though a male employee who also had violated company policy and was caught on videotape doing so was never disciplined and was subsequently promoted by employer); *Kelley v. Goodyear Tire & Rubber Co.*, 45 F. Supp. 2d 888, 892-93 (D. Kan. 1999) (granting summary judgment to the employer on a black male plaintiffs race discrimination claim and deferring to the employer’s explanation that it had not hired plaintiff because he had not performed well during the interview and had not completed the employment application, even though the plaintiff offered evidence that the employer’s interviewer may have fabricated the interview notes after the plaintiff filed his race discrimination claim, employer did not raise the “incomplete application” defense before the state civil rights commission, and the employer accepted incomplete applications from the other white and black applicants), *aff’d*, 220 F.3d 1174 (10th Cir. 2000); *Romero v. Banco Popular de P.R.*, 35 F. Supp. 2d 195 (D.P.R. 1999) (granting summary judgment to the employer on a black male plaintiffs race and national origin claims and deferring to the employer’s contention that the white candidate selected was the superior candidate, even though some selection criteria were subjective, the white candidate selected did not have the minimum educational requirements for the job, the position that the plaintiff sought was being vacated by plaintiffs immediate supervisor, who was never asked about plaintiffs qualifications for the job, and the plaintiffs immediate supervisor and another retired bank official presented sworn affidavits stating that the employer had unwritten rules about not promoting black employees), *aff’d in part, vacated in part*, 212 F.3d 607 (1st Cir. 2000) (affirming the decision as to failure to promote and constructive termination claims, but remanding on a race-based harassment charge); *see also infra* Part II.D. (discussing the need for employees to prove superior qualifications in the Fifth and Tenth Circuits); *cf. Kennedy v. Quaker Oats Co.*, No. 97-CV-72094-DT, 1998 U.S. Dist. LEXIS 15340, at *6-7, 27 (E.D. Mich. Aug. 17, 1998) (granting summary judgment for the employer on a white male plaintiffs age discrimination claim even though the criteria the employer used to evaluate employees as part of the downsizing plan were subjective, the employer did not validate the criteria used, and the plaintiff offered statistical evidence showing the significant impact of the downsizing plan on older workers).

bias and reinforces the belief that discrimination in today's market is an anomaly.

C. REDEFINING ISSUES OF FACT AS ISSUES OF LAW

1. Introduction

In circumstantial evidence cases, summary judgment should be used sparingly because a determination of discriminatory intent is essentially a question of fact.¹⁸⁸ "The role of determining whether the inference of discrimination is warranted must remain within the province of the jury, because a finding of discrimination is at bottom a determination of intent."¹⁸⁹ Increasingly, however, the federal courts are usurping the role of the jury by making fact determinations on summary judgment under the guise of determining whether the plaintiff has made out a legally

188. See *Nesbitt v. Am. Drug Stores*, 82 F. Supp. 2d 832, 833 (N.D. Ill. 1999) ("Moreover, 'intent and credibility are crucial issues in employment discrimination cases, and therefore, the summary judgment standard is applied with added rigor in such cases.'" (citation omitted)); *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 396 (S.D.N.Y. 1999) ("Summary judgment should be used cautiously in employment discrimination cases 'where, as here, the employer's intent is at issue.'" (citations omitted)); *Salmon v. West Clark Community Schs.*, 64 F. Supp. 2d 850, 859 (S.D. Ind. 1999) ("When summary judgment is sought in an employment discrimination case, as here, the criteria associated with summary judgment must be applied with 'added scrutiny because matters of intent and credibility are crucial issues.'" (citations omitted)); *Zephyr v. Ortho McNeil Pharm.*, 62 F. Supp. 2d 599, 601 (D. Conn. 1999) ("A district court must be especially cautious about granting summary judgment in an employment discrimination case when the employer's intent is at issue." (citation omitted)); *Taylor v. Blue Cross & Blue Shield of Tex., Inc.*, 55 F. Supp. 2d 604, 608 (N.D. Tex. 1999) ("Because employment discrimination claims involve nebulous questions of motivation and intent, summary judgment is usually considered an inappropriate tool for resolving these cases." (citation omitted)); *Johnson v. Runyon*, 928 F. Supp. 575, 579 (D. Md. 1996) ("In Title VII cases, courts should be wary of summary judgment motions because a party's intent is often the crucial element in such cases." (citation omitted)), *aff'd per curiam*, 151 F.3d 1029 (4th Cir. 1998); see also McGinley, *supra* note 133, at 208 (noting that civil rights cases "most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide" (footnote omitted)); see generally Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 95-96 (1999) (agreeing with those federal courts that hold that hostile environment cases "do not lend themselves to decision on summary judgment" because of the "highly fact-specific inquiry" involved (footnote omitted)).

189. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996).

sufficient claim of employment discrimination.¹⁹⁰ By defining certain kinds of evidence as legally irrelevant to the determination of discriminatory animus, the federal courts have significantly narrowed the legal definition of actionable discrimination. This, in turn, makes it more difficult for plaintiffs to construct cases of discrimination based on circumstantial evidence alone.

2. Retaliation

The research on organizational justice demonstrates that employees who file discrimination complaints or other types of grievances fare worse in the organization than employees who do not pursue such claims.¹⁹¹ Moreover, employees who win

190. See, e.g., *EEOC v. MCI Telecomms., Inc.*, No. 98-1195, 1999 U.S. App. LEXIS 17847, at *9-10 (4th Cir. July 28, 1999) (affirming an order granting summary judgment for the employer on the plaintiff's claim of race and national origin discrimination, noting that while the selecting official "emphasized differing criteria" in explaining his rationale for not hiring the plaintiff, "this inconsistency [did not] rise[] to the level of mendacity"); *Bell v. EPA*, No. 97 C 6349, 1999 U.S. Dist. LEXIS 16445, at *17-20 (N.D. Ill. Oct. 14, 1999) (granting summary judgment to the employer on the plaintiff's race, national origin, and age discrimination claims and concluding that a written memorandum drafted by one of the selecting officials which stated that two of four plaintiffs were better qualified than the candidates selected was inadmissible hearsay and, thus, could not establish evidence of pretext); *Bickerstaff v. Nordstrom, Inc.*, 48 F. Supp. 2d 790, 800 (N.D. Ill. 1999) (granting summary judgment to the employer on the plaintiff's race discrimination claim, concluding that the employer may have lied to the plaintiff about the reasons the plaintiff was not selected for position because a lie "might have been more palatable" and that "[n]ot every lie" constitutes evidence of bad intent, "even if the lie is related to the employment decision" (citation omitted)); *Kelley v. Goodyear Tire & Rubber Co.*, 45 F. Supp. 2d 888, 892 (D. Kan. 1999) (granting summary judgment to the employer on the plaintiff's race discrimination and retaliation claims, in part, because the plaintiff supposedly performed poorly in the interview, by crediting the employer's explanation that even though the interviewer had signed and dated the plaintiff's employment application several months after the plaintiff had filed his discrimination claim, the "confusion" about the interview date did not "raise an issue as to whether the notes [the interviewer] made during the interview were fabricated for the purposes of this litigation"); see also cases cited *infra* at Parts II.C.2. & 3.; McGinley, *supra* note 133, at 237-41 (explaining that federal courts in employment discrimination cases are making credibility determinations in favor of employers at the summary judgment stage).

191. See Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 126-28 (1999) (citing studies showing that employees who file grievances or discrimination claims are significantly more likely to experience negative employment-related treatment).

grievances against their employers have "significantly lower rates of promotion and significantly higher rates of termination and lay-offs than similarly situated employees who ha[ve] lost their appeals."¹⁹² The research suggests that employers punish employees who file grievances, especially when the employee prevails on her grievance.¹⁹³

Most employers, however, are unlikely to admit to retaliation. A plaintiff then must prove her case through circumstantial evidence. Yet, a number of federal courts have made it easier for employers to prevail on motions for summary judgment in retaliation cases by restricting the kinds of evidence that the court considers legally relevant to a finding of retaliation.¹⁹⁴ For example, some courts have granted

192. *Id.* at 127.

193. *Id.*

194. *See, e.g.,* *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999) (affirming an order granting summary judgment for the employer on a race discrimination claim, notwithstanding the plaintiff's strong objective qualifications and the prior settlement of a race discrimination suit against the employer, because the plaintiff could not connect the individuals involved in his current claim of discrimination to those involved in the successful race discrimination suit), *cert. denied*, 120 S. Ct. 53 (1999); *Johnson v. Runyon*, 928 F. Supp. 575, 585, 589 (D. Md. 1996) (granting summary judgment for the employer on two separate claims of retaliatory discrimination, discounting the plaintiff's claims by noting that knowledge of prior discrimination complaints does not suffice to show retaliation), *aff'd per curiam*, 151 F.3d 1029 (4th Cir. 1998); *Roberts v. Oklahoma*, No. 95-6235, 1997 U.S. App. LEXIS 6679, at *22-25 (10th Cir. Apr. 8, 1997) (affirming an order granting summary judgment for the employer on a sex discrimination claim, finding that the plaintiff's complaints about procedural irregularities in the screening process did not demonstrate pretext because the employer corrected these irregularities by convening a second screening committee after the plaintiff registered her complaint).

The Fifth Circuit has narrowly circumscribed the legal definition of retaliation, under § 704 of the Civil Rights Act of 1964, to include only ultimate employment decisions, such as termination. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Negative performance reviews, reprimands by supervisors, and disciplinary action taken against employees who have complained of employment discrimination do not constitute evidence of retaliation in the Fifth Circuit. *See id.* at 708; *see also Wakefield v. State Farm Ins. Co.*, 75 F. Supp. 2d 545, 549 (N.D. Tex. 1999) (granting summary judgment to the employer on the black male plaintiff's retaliation claims because negative performance evaluations and failure of the employer to consider the plaintiff for promotion, based on those performance evaluations, do not give rise to an actionable claim for retaliation as neither involves an ultimate employment decision), *aff'd*, 200 U.S. App. LEXIS 22589 (5th Cir. 2000); *see also Valentine v. Bowsher*, No. 3:96-CV-0982-D, 1998 U.S. Dist. LEXIS 8992, at *4 (N.D. Tex. June 15, 1998) (granting summary judgment on the black female plaintiff's retaliation claim "[a]ssuming *arguendo* that the

summary judgment in favor of the employer even though the plaintiff has presented evidence of a negative employment action taken anywhere from two weeks to ten months after the employee complained of employment discrimination.¹⁹⁵ Other courts have concluded, as a matter of law, that a plaintiff cannot prevail on a retaliation claim even if she provides evidence that a supervisor against whom the plaintiff has filed a discrimination claim participated in the challenged employment decision and that the challenged employment decision involved subjective criteria.¹⁹⁶

[challenged employment actions were] ultimate employment decisions"), *aff'd*, 172 F.3d 869 (5th Cir. 1999); *Walker v. Uncle Bens, Inc.*, No. 4:97-CV-65-D-B, 1998 U.S. Dist. LEXIS 4648, at *26-28 (N.D. Miss. Mar. 30, 1998) (granting the employer's motion for summary judgment on the black female plaintiff's retaliation claim based on failure to obtain a "right-to-sue" letter, and citing with approval the "ultimate employment decision" rationale of *Mattern*). By narrowly defining what constitutes actionable retaliation, the Fifth Circuit has rendered a jury trial unnecessary except in those circumstances where the employer, for example, has fired the employee in retaliation for protected Title VII activity. *But see* *Marshall v. Shalala*, 16 F. Supp. 2d 16, 21 n.7 (D.D.C. 1998) (declining to adopt the Fifth Circuit's "narrower view of the type of retaliatory conduct that is actionable under Title VII"), *aff'd*, 1999 U.S. App. LEXIS 7352 (D.C. Cir. Mar. 2, 1999).

195. *See, e.g.,* *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 914 (8th Cir. 1999) (affirming summarily the district court's order granting summary judgment on the plaintiff's claim of retaliatory discharge, even though the employer terminated the plaintiff only four months after the plaintiff filed suit for race discrimination); *Carpenter v. Fed. Nat'l Mortgage Ass'n*, 174 F.3d 231, 234 (D.C. Cir. 1999) (affirming an order granting summary judgment on the plaintiff's retaliation claim even though she received a less-favorable performance evaluation than those she had received in the past only two weeks after filing an appeal in her discrimination claim against the employer), *cert. denied*, 120 S. Ct. 184 (1999); *Malone v. K-Mart Corp.*, 51 F. Supp. 2d 1287, 1307 n.13 (M.D. Ala. 1999) (granting summary judgment on a retaliation claim, in part, because the plaintiff's poor performance evaluations, which she alleged were in retaliation for her race and sex discrimination complaints, occurred ten months after the plaintiff's EEOC charge and, hence, "were 'not temporally close enough to support an inference of causal connection'" (citation omitted)). *But see* *Stewart v. Rutgers*, 120 F.3d 426, 433-34 (3d Cir. 1997) (reversing the trial court's order granting summary judgment for the employer and concluding that a grievance committee's finding that denial of tenure to the plaintiff in 1992-93 was "arbitrary and capricious" was relevant to the plaintiff's race discrimination claim for denial of tenure in 1994-1995).

196. *See, e.g.,* *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 330 (5th Cir. 1998) (affirming an order granting summary judgment for the employer on the plaintiff's race discrimination claim because "there was no causal connection" between a supervisor's racist comment and the employer's failure to promote the plaintiff, even though the supervisor was disciplined for the comment and the employer based its promotion decision on the supervisor's annual evaluation of the plaintiff's performance), *cert. denied*, 526 U.S. 1051 (1999);

The D.C. Circuit's decision in *Carpenter v. Federal National Mortgage Ass'n*¹⁹⁷ (*Carpenter II*) illustrates how the federal courts are making factual determinations on summary judgment, resulting in a narrower definition of what constitutes actionable retaliation under Title VII. *Carpenter II* involved a claim by Joann Carpenter, a white woman, against her employer, Federal National Mortgage Association (Fannie Mae), alleging that Fannie Mae had denied her a promotion and downgraded her performance rating in retaliation for filing a prior complaint of sex discrimination (*Carpenter I*) against Fannie Mae.¹⁹⁸ While Carpenter had received performance ratings of "5" and "5-" for the seven years prior to filing *Carpenter I*, she received a rating of "4+" only two weeks after lodging an appeal in that case.¹⁹⁹ In addition, shortly after filing the *Carpenter I* appeal, Carpenter learned that her supervisor, Anastasia Kelly, had selected another candidate for a senior vice president position in Fannie Mae's General Counsel office.²⁰⁰ Fannie Mae justified rejecting Carpenter for the senior vice president position because she lacked litigation experience, which Fannie Mae allegedly desired.²⁰¹ The district court granted summary judgment for Fannie Mae on both of

Grimes v. Tex. Dep't of Mental Health & Mental Retardation, 102 F.3d 137, 138-39 (5th Cir. 1996) (affirming an order granting summary judgment for the employer on a race discrimination claim, even though the plaintiff had won a prior case of race discrimination against the employer and the white man who had obtained that discriminatory promotion was responsible for the promotion decision giving rise to the instant race discrimination case); Valentine v. Bowsher, No. 3:96-CV-0982-D, 1998 U.S. Dist. LEXIS 8992 (N.D. Tex. June 15, 1998) (granting summary judgment to the employer on retaliation claim based on the employer's failure to place the plaintiff on its Best Qualified list for promotion on two separate occasions after the plaintiff had filed a race discrimination complaint even though the employer offered no evidence that its rankings for the Best Qualified list were based on objective, nondiscriminatory criteria, and the plaintiff offered evidence that one of the members of the Best Qualified ranking panel had been on the panel about which the plaintiff had filed her prior discrimination complaint and that same panel member had made negative comments about plaintiff), *aff'd*, 172 F.3d 869 (5th Cir. 1999).

197. 174 F.3d 231 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 184 (1999).

198. *Id.* at 234. The D.C. Circuit affirmed the trial court's order granting summary judgment to Fannie Mae on Carpenter's prior claim of employment discrimination. *Id.* In her first lawsuit, Carpenter claimed that Fannie Mae had discriminated against her by failing to promote her. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 235.

Carpenter's claims.²⁰² In a surprising decision, the D.C. Circuit affirmed the trial court's decision,²⁰³ giving short shrift to the possibility that Carpenter's two supervisors, who had been involved in prior "contentious" litigation²⁰⁴ with her, had influenced either her evaluation downgrade or her chances for promotion to senior vice president.

First, even though Carpenter offered evidence that both Kelly and Anthony Marra, Carpenter's other supervisor, had warned Carpenter not to file *Carpenter I*,²⁰⁵ the district court ruled that those statements were relevant only to the *Carpenter I* litigation.²⁰⁶ By doing so, the court converted an issue of fact into one of law. Given the "contentious nature of *Carpenter I*"²⁰⁷ and the comments of both Kelly and Marra, a jury logically could infer that the warnings issued by Carpenter's superiors, which she failed to heed, influenced her subsequent performance evaluation.

Second, in affirming the district court's denial of Carpenter's request for discovery on her evaluation downgrade, the D.C. Circuit quoted from Anthony Marra's affidavit. Marra stated that the attorneys "who received ratings of 5 or 5-exemplified [the high standards of the Legal Department], and their contributions clearly exceeded that of their peers."²⁰⁸ The court accepted Marra's statement as conclusive proof of a disputed factual issue: whether retaliation accounted for Carpenter's downgrade. Even more surprising was the D.C. Circuit's failure to berate the trial court for making credibility determinations on a motion for summary judgment.²⁰⁹ Yet, Kelly and Marra certainly had reason to retaliate against

202. *Id.*

203. *Id.* at 234.

204. *Id.* at 237.

205. Kelly told Carpenter "not to cut off [her] nose to spite [her] face," and "Marra told her to 'drop' her claim" *Id.* at 234 (quoting the trial court).

206. *See id.* at 235.

207. *Id.* at 237.

208. *Id.* (citation omitted).

209. At the summary judgment stage, credibility determinations, which necessarily involve a factual assessment of a witness's testimony, are inappropriate. *See, e.g.,* *Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999) (concluding that the district court had "quite clearly invaded the province of the jury" by granting summary judgment for the defendant because "the task of determining the credibility of a witness is the exclusive domain of the finder of fact"); *see generally* McGinley, *supra* note 133, at 237-41 (discussing improper determinations of credibility by some federal courts at the summary judgment stage).

Carpenter. Both supervisors had warned Carpenter not to file suit, and Carpenter alleged that both had lied during her first lawsuit against Fannie Mae.²¹⁰ Nonetheless, the D.C. Circuit affirmed the trial court's grant of summary judgment, denying Carpenter the opportunity to present her evidence to a jury.

While troubling, the decision in *Carpenter II* is consistent with the meritocracy myth's basic assumption that merit, not discrimination, drives employers' hiring and promotion decisions. Limiting a plaintiff's ability to prove retaliation by labeling evidence as irrelevant, or by accepting, on a motion for summary judgment, an employer's self-serving statements as conclusive proof of contested facts restricts the number of cases in which a plaintiff can potentially prevail. By doing so, the courts legitimize employers' decisions and reinforce the belief that individual failings, such as lack of litigation experience, rather than systemic flaws, like employer retaliation or discrimination, account for the differential outcomes observed in the workplace.

3. Evidence of Discriminatory Remarks or Attitudes in the Workplace

Some federal courts limit the plaintiffs ability to use evidence of racist and sexist remarks and attitudes in the workplace in making out a circumstantial case of intentional discrimination. By concluding that certain discriminatory remarks and attitudes are not relevant to a determination of unlawful intent, these courts convert contested issues of fact into issues of law. By doing so, they increase the employer's chances for winning on summary judgment and limit the cases in which plaintiffs prevail on disparate treatment claims based on circumstantial evidence.

a. Discriminatory Remarks by Supervisors

*Boyd v. State Farm Insurance Cos.*²¹¹ illustrates how labeling racist and sexist comments by supervisors as "stray remarks"²¹² in the workplace converts a factual issue of employer intent into a legal issue, in turn, making it easier for federal courts to grant summary judgment in the employer's

210. *Carpenter*, 174 F.3d at 234.

211. 158 F.3d 326 (5th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999).

212. The "stray remark" language comes from Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

favor.²¹³ *Boyd* involved a lawsuit by Jimmy Boyd, a black man, against State Farm, his employer, for race discrimination for failing to promote him to the position of Supervisor IV.²¹⁴ State Farm relied on Boyd's December 1994 Performance Planning and Review Evaluation (PPR) to justify its promotion decision.²¹⁵ Boyd's supervisor, Bruce Sutton, a white male, prepared the 1994 PPR, "which was not as favorable as Boyd's past reviews."²¹⁶ Sutton, however, had been disciplined during the prior year for calling Boyd "Buckwheat" at a firm social

213. See, e.g., *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 915-16 (8th Cir. 1999) (affirming an order granting summary judgment for the employer on a race discrimination claim, even though the supervisor who had referred to the plaintiff as "Buckwheat" was responsible for the plaintiff's adverse performance evaluations, on which the employer based its decision to terminate the plaintiff's employment); *Gartman v. Gencorp, Inc.*, 120 F.3d 127, 129-131 (8th Cir. 1997) (reversing the trial court's denial of the employer's motion for judgment as a matter of law on the plaintiff's sex discrimination claim, concluding that the division president's comment that the plaintiff did not know "how to belly up to the bar" was not a gender-based remark and that the division vice president's comment "S—t, another gal" in response to the firm's naming a woman to monitor supplier quality was not relevant, having been made several months before the adverse employment action); *Harris v. Parker Hannifin Corp.*, No. 1:97-CV-254-B-D, 1998 U.S. Dist. LEXIS 13526, at *8-9 (N.D. Miss. Aug. 19, 1998) (granting summary judgment to the employer on a race discrimination claim, noting that the discriminatory remarks of two white supervisors and the hostility of white co-workers were "irrelevant to the issue of pretext" because neither supervisor had participated in the hiring decision and the firm's management had not exhibited hostility toward the plaintiff); cf. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (affirming the trial court's entry of judgment as a matter of law on the plaintiff's sex discrimination claim for failure to send her to the Police Academy, concluding that the plaintiff could not use a mixed-motive analysis because a statement by the plaintiff's supervisor, the Chief of the University police, that "he was never going to send a female to the [Police] Academy" was made "in response to [another officer's question] as to whether [the plaintiff] would be joining him in attending the Police Academy" [and, thus, did not] "bear directly on the contested employment decision" (citation omitted)), *cert. denied*, 120 S. Ct. 1243 (2000). Compare *Paulsboe v. Farnam Cos.*, No. 97-7003, 1997 U.S. App. LEXIS 19990, *8-9 (10th Cir. Aug. 1, 1997) (concluding that a supervisor's concern about the plaintiff's willingness to drink and socialize with clients, which the supervisor described "as being 'one of the guys,'" was not a gender-based comment), with GLASS CEILING REPORT, *supra* note 24, at 28 ("What's important is comfort, chemistry, relationships, and collaborations. . . . When we find minorities and women who think like we do, we snatch them up." (citation omitted)).

214. Boyd also sued for wrongful termination pursuant to the Family and Medical Leave Act. See *Boyd*, 158 F.3d at 328.

215. See *id.* at 329.

216. *Id.* at 327-28.

event.²¹⁷ Boyd also alleged that Sutton had called him a "Porch Monkey" on another occasion.²¹⁸

The district court granted summary judgment for State Farm, concluding that the "Buckwheat" comment was "a stray remark from which no reasonable fact-finder could infer race discrimination."²¹⁹ The Fifth Circuit agreed. Labeling Sutton's comments as "isolated remarks," the court concluded that Boyd had failed to "provide evidence of a causal connection"²²⁰ between the remarks and State Farm's failure to promote him.

The decision in *Boyd* is disturbing for several reasons. First, both the trial court and the Fifth Circuit in *Boyd* misapplied the "stray remarks" language from Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*.²²¹ *Hopkins* was a "mixed motive" case, which is a direct, not circumstantial, evidence case.²²² In fact, Justice O'Connor's famous "stray remarks" language directly follows her discussion of when the burden shifts to the employer in a case in which a disparate treatment plaintiff has shown "by direct evidence that an illegitimate criterion was a substantial factor in the [challenged employment] decision."²²³ Justice O'Connor did not say that "stray remarks" were not probative of intent in circumstantial evidence cases, where plaintiffs weave together various pieces of evidence to create an inference of discrimination.²²⁴ Moreover, *Hopkins* involved an appeal

217. *Id.* at 327.

218. *Id.* at 329.

219. *Id.*

220. *Id.* at 330; see *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999) (concluding that a supervisor's racist comments were not related to the employer's decision to terminate the plaintiff, because the plaintiff failed to establish "a causal link between the racial comments and the adverse employment decision"); *Rhone v. Tex. Dep't of Trans.*, CA3:96-CV-1147-BC, 1997 U.S. Dist. LEXIS 22911, at *16-17 (N.D. Tex. Aug. 29, 1997) (stating that a supervisor's admission he had likely used the term "nigger," employee's deposition testimony that she had heard the supervisor use the word "nigger," and supervisor's comment about the playing of "jungle music" at company events were "nothing more than unfortunate stray remarks" that the court would not consider "because there [was] no connection between the alleged racist remarks . . . and the challenged employment action" (citations omitted)).

221. 490 U.S. 228, 276-77 (1989) (O'Connor, J., concurring).

222. See *supra* note 130.

223. *Hopkins*, 490 U.S. at 276-277 (O'Connor, J., concurring).

224. In fact, Justice O'Connor stated that "stray remarks in the workplace, while perhaps probative of sexual harassment cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria." *Id.* at 277 (O'Connor, J., concurring) (citation omitted).

from a trial court decision on the merits. Thus, it clearly does not stand for the proposition that federal courts can determine, at the summary judgment stage, that racist and sexist remarks are legally irrelevant to a determination of discriminatory intent in a circumstantial evidence case.

Second, by deciding that Sutton's racist remarks could not support an inference of discriminatory intent, the Fifth Circuit resolved the central factual issue in a disparate treatment case on a motion for summary judgment.²²⁵ In circumstantial evidence cases, the fact finder weaves together pieces of evidence in order to create the necessary inference of unlawful intent. But the Fifth Circuit concluded that a reasonable fact finder could not infer discriminatory intent from Sutton's racist remarks. This conclusion is open to debate. After all, State Farm did not promote Boyd based on Sutton's adverse evaluation, which followed Sutton's discipline for calling Boyd "Buckwheat." A reasonable jury certainly could draw the necessary inference of discriminatory animus from this sequence of events.

Third, overtly racist and sexist comments are much less common in today's workplace. A decline in traditional prejudice accounts, in part, for this change in behavior.²²⁶ But, in addition, voicing such views is considered socially unacceptable.²²⁷ Employers also are aware that overt racist and sexist remarks may constitute direct evidence of discrimination.²²⁸ As a consequence, it is unlikely that supervisors will repeatedly make overtly racist and sexist comments on the job. It is unclear, then, why even "isolated" discriminatory remarks are not considered probative of a supervisor's attitudes towards black or female employees. The *Boyd* court's dismissal of the "Buckwheat" and "Porch Monkey" comments as "isolated" utterances ignores the ways in which workplace norms have changed over the past thirty years.

225. Other courts have engaged in a similar analysis. See *supra* note 190 and accompanying text.

226. See *supra* text accompanying notes 73-74.

227. See Dovidio & Gaertner, *supra* note 7, at 6 ("Because of current cultural values . . . most whites . . . have convictions concerning fairness, justice, and racial equality."); Dovidio, *supra* note 77 (suggesting that overt racism has changed to a more subtle form of aversive racism, in which overt hostility is rare, but discrimination still manifests itself in an indirect fashion).

228. See *supra* note 132 and accompanying text.

Finally, it is unclear why racist remarks, even when removed in time from the adverse employment decision, are not probative of the employer's intent. This conclusion is premised on the assumption that racist comments do not reflect racist beliefs, or perhaps that an employer's beliefs, notwithstanding earlier racist comments, have changed in the interim. The research on the persistence of stereotypes, however, belies both assumptions.²²⁹

b. Discriminatory Remarks by Co-Workers and Discriminatory Workplace Attitudes

When plaintiffs take one step back and offer evidence of discriminatory remarks by, or biased attitudes of, co-workers, the courts are even more hesitant to allow plaintiffs to use such evidence as part of their circumstantial cases.²³⁰ *Ferron v.*

229. See Devine & Elliot, *supra* note 180, at 1147 (noting the difficulty, even for low-prejudiced individuals, of "breaking the prejudice habit" because of the ingrained nature of cultural beliefs about the inferiority of blacks (citation omitted)); see also *supra* Part I.C. for a discussion of how discrimination operates in subtle ways.

230. See, e.g., *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608-10 (4th Cir. 1999) (concluding that a remark by the employer club's greens superintendent that he would have a problem working for a woman was not connected to the employer's decision to terminate the female plaintiff, even though the employer did so, in part, because of problems the plaintiff encountered in supervising the greens superintendent); *Romero v. Banco Popular de P.R.*, 35 F. Supp. 2d 195, 199 (D.P.R. 1999) (granting summary judgment for the employer on the plaintiff's race and national origin claims, noting that sworn statements by past and current supervisors that the employer had unwritten rules about not promoting black candidates do not constitute evidence of discriminatory intent because "[g]eneral charges of discrimination . . . do not create a 'case or controversy'"), *aff'd in part, vacated in part*, 212 F.3d 607 (1st Cir. 2000) (affirming the decision as to failure to promote and constructive termination claims, but remanding on a race-based harassment charge); *Holmes v. Fed. Aviation Admin.*, NO. 98-5071 (JEI), 1999 U.S. Dist. LEXIS 14955, at *23 (D.N.J. Sept. 29, 1999) (granting summary judgment to the employer on race, age, and retaliation claims, concluding that the employer's "Glass Ceiling Report," which found that some minorities believed that non-minority males received better support and advancement opportunities, was not relevant to the issue of pretext because the report could be "characterized as evidence of the [employer's] commitment to ensuring a diverse workplace"); *Ford v. Sheriff-Coroner's Dep't*, No. C-97-3396 VRW, 1998 U.S. Dist. LEXIS 19912, at *23-24 (N.D. Cal. Dec. 21, 1998) ("The fact that certain officers, none of whom was responsible for making the decision whether to promote plaintiff, may have sexually harassed women, including plaintiff, does not suggest that the explanation offered by other officers, those who were responsible for the decision, is a pretext for discrimination."); cf. *Tidwell v. County of Riverside*, No. 96-56219, 1997 U.S. App. LEXIS 34833, at *3 (9th Cir. Dec. 9, 1997) (holding that evidence of racial jokes and remarks at

*West*²³¹ provides a good example of the federal courts' reluctance to consider evidence of discriminatory workplace attitudes as part of the plaintiff's circumstantial proof of the employer's discriminatory intent. Kenneth Ferron, a black firefighter, sued the United States Army, his employer, for race discrimination stemming from the Army's decision not to promote him to a GS-6 or GS-7 position at its Fort Stewart Fire Department (Fort Stewart).²³² The Army promoted five white male applicants to the available GS-6 and GS-7 positions.²³³ The Army based its decision not to promote Ferron on evaluations provided by his supervisors.²³⁴ Evaluating supervisors commented that Ferron "sat 'around doing nothing," lacked the initiative and motivation of other candidates, and "always needed guidance and supervision."²³⁵ As a result, K.H. VanderArk, who made the promotion decisions, determined that Ferron was not yet "ready to take over a leadership position within the department."²³⁶

Ferron attacked the Army's evaluations as subjective and a "mask for racial preferences."²³⁷ He presented evidence that VanderArk had made fifteen promotion decisions at Fort Stewart, none of which involved the promotion of a black candidate.²³⁸ In addition, VanderArk's testimony suggested, although not conclusively, that he had inherited a "good old boy," "racially motivated" employment system at Fort Stewart.²³⁹

a building permit office failed to show "the existence of racially discriminatory licensing policies" sufficient to sustain the plaintiffs' Equal Protection Clause claim). *But cf.* *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997) ("Although stray remarks by non-decisionmakers alone are insufficient to establish discriminatory intent, we have held that such remarks still can constitute evidence of the atmosphere in which the employment decision was carried out, and therefore can be relevant to the question of retaliation." (citations omitted)).

231. 10 F. Supp. 2d 1363 (S.D. Ga. 1998).

232. *Id.* at 1365.

233. *Id.* at 1367.

234. *Id.*

235. *Id.* (citations omitted).

236. *Id.* (citation omitted).

237. *Id.* at 1369.

238. *Id.* at 1368.

239. *Id.* VanderArk first acknowledged that Hunter Army Airfield, where he previously had worked, had a "better balance of hiring and practices" than Fort Stewart. *Id.* He said he was not certain that the Fort Stewart system had been "racially motivated." *Id.* But VanderArk then said he had been at Fort Stewart for only one year, he could not fix the system "overnight," and he

In granting the Army's motion for summary judgment, the court improperly concluded, as a matter of law, that Ferron's evidence of workplace discrimination would not suffice to create an inference of discriminatory intent on the part of his employer. First, VanderArk's testimony about the employment practices at Fort Stewart was ambiguous. As a result, Ferron should have had the opportunity at trial to seek clarification, through cross-examination, of VanderArk's perceptions of the employment system at Fort Stewart.²⁴⁰ In addition, the court accepted, as a matter of law, VanderArk's assertion that he had acted impartially in making the challenged promotion decisions. But weighing the credibility of an employer's evidence is improper at the summary judgment stage.²⁴¹ Credibility determinations rest within the province of the fact finder.

Second, a reasonable jury could conclude based on the circumstantial evidence presented that the Army had discriminated against Ferron. The Army based its promotion decision on subjective evaluations of Ferron's ability. Research shows that "whites tend to evaluate blacks less favorably than whites on subjective dimensions of work performance."²⁴² Moreover, some of the criticisms voiced in Ferron's evaluations reflect negative stereotypes associated with black Americans.²⁴³ For example, some supervisors complained that Ferron "sat 'around doing nothing'" and was less motivated than other candidates, comments suggesting that Ferron was lazier than the white applicants, a stereotype often applied to black employees.²⁴⁴ If VanderArk inherited a racially motivated,

was only explaining "what [he] inherited" at Fort Stewart. *Id.* VanderArk also noted that he was not "one of their good old boys out there." *Id.*

The court issued Ferron's attorney a "strong warning" for "distorting by omission" VanderArk's comments about the employment system at Fort Stewart. *Id.* at 1371.

240. See *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071-72 (3d Cir. 1996) (en banc) ("In making [its] finding [that an inference of discrimination is warranted], the jury must perform its traditional function of assessing the weight of the evidence, the credibility of the witnesses through observation of both direct testimony and cross-examination at trial, and the strength of the inferences that can be drawn from the elements of the prima facie case and the evidence that undermines the employer's proffered reasons for its actions." (citations omitted)).

241. See McGinley, *supra* note 133, at 237-41.

242. Dovidio & Gaertner, *supra* note 7, at 18 (citation omitted).

243. See Devine & Elliot, *supra* note 180, at 1139.

244. See *id.* at 1146 tbl.3.

good old boy system, then race discrimination could account for Ferron's lower evaluations, which formed the basis of the employer's decision not to promote him.

Third, the court in *Ferron* ignored the impact of workplace attitudes on supervisory decisions. The rational bias theory posits that "individuals who do not themselves hold negative prejudices may nonetheless 'rationally' choose to discriminate . . . if they believe those in power over them and their careers expect or approve of such behavior, particularly if the organizational climate is one in which discrimination appears to be the norm."²⁴⁵ The rational bias theory places VanderArk's decision and the court's justification for that determination in a new light. VanderArk denied being "one of [the] good old boys out there,"²⁴⁶ claiming he made an impartial decision on Ferron's promotion. In addition, the court noted that VanderArk had promoted five black employees during his tenure at Hunter Army Airfield, where he had worked before coming to Fort Stewart.²⁴⁷ The court used this information to rebut Ferron's evidence that VanderArk had failed to promote any black employees at Fort Stewart.²⁴⁸ Yet Ferron's evidence is consistent with the rational bias theory. Even if VanderArk were not personally biased against black employees, he might choose to promote only white candidates in a system he perceived as rewarding such behavior. "[A] supervisor might discriminate racially in job assignments in order to placate the prejudice pervasive in the labor force. Instances of this variety of the heckler's veto would be consciously intended to further the employer's interests by preserving peace in the workplace."²⁴⁹ VanderArk admitted that there "always [had] been a better balance of hiring and practices at Hunter" than at

245. Susan Trentham & Laurie Larwood, *Gender Discrimination and the Workplace: An Examination of Rational Bias Theory*, 38 SEX ROLES 1, 2 (1998) (citations omitted).

246. *Ferron v. West*, 10 F. Supp. 2d 1363, 1368 (S.D. Ga. 1998) (citation omitted).

247. *See id.* at 1368 n.5.

248. *See id.*

249. *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998); *see also Derasmo v. City of Gainesville*, 78 Fair Emp. Prac. Cas. (BNA) 384, 390-91 (N.D. Fla. Sept. 22, 1998) ("[T]he record is replete with comments and actions by the male supervisors and co-workers which reveal that they did not approve or enjoy having female firefighters in the force. These comments supply a reason why the employer may have been motivated to terminate plaintiff and then devise a pretextual reason for the termination.").

Fort Stewart.²⁵⁰ Thus, he may have promoted black employees at Hunter and not done so at Fort Stewart because he recognized that Fort Stewart operated as a "good old boy's" network,²⁵¹ where race discrimination was tolerated.

A trier of fact faced with evidence of discriminatory workplace attitudes, as in *Ferron*, or racist remarks, as in *Boyd*, certainly might conclude, after hearing all of the evidence, that race discrimination did not motivate the challenged employment decision. The problem is that the federal courts are not allowing plaintiffs to make these arguments to the trier of fact. Instead, an alarming number of federal courts are making these factual determinations of discriminatory intent on employer motions for summary judgment.²⁵² By doing so, they send a message to employers: do not worry about evidence of bias in the workplace so long as supervisory personnel responsible for decisions do not use racist or sexist language near the time of hiring or promotion decisions. This message, in turn, creates a disincentive for employers to take affirmative steps to eliminate such bias in the workplace.

D. THE "CLEARLY BETTER QUALIFIED" REQUIREMENT

In both the Fifth and the Tenth Circuits, a plaintiff cannot survive an employer's motion for summary judgment simply by producing evidence that she is more qualified than the candidate selected by the employer.²⁵³ The Fifth Circuit requires a plaintiff to demonstrate that she is "clearly"²⁵⁴ better

250. *Ferron*, 10 F. Supp. 2d at 1368.

251. *See id.*

252. *See supra* notes 190, 213, 230, and accompanying text (providing case citations to many of these cases); *see also supra* note 140 and accompanying text (explaining the results of the LEXIS search that formed the basis of this Article).

253. *See Rutherford v. Harris County*, 197 F.3d 173, 182 n.9 (5th Cir. 1999) (clarifying the Fifth Circuit precedent on the issue of comparative qualifications by noting that unless a plaintiff's evidence establishes that her qualifications are so superior to the person selected as to "jump off the page," the court's belief that the employer selected a less qualified person for the job, by itself, does not establish pretext); *Paulsboe v. Farnam Cos.*, No. 97-7003, 1997 U.S. App. LEXIS 19990, at *8 (10th Cir. Aug. 1, 1997) ("Absent evidence that one candidate is 'overwhelmingly better qualified,' pretext cannot be shown simply by comparing plaintiff's qualifications with those of the successful applicant." (citations omitted)).

254. *E.g.*, *Deines v. Tex. Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 279 (5th Cir. 1999) ("We reemphasize the general rule that differences in

qualified than the candidate selected for the position. Similarly, the Tenth Circuit requires proof that the plaintiff is "clearly"²⁵⁵ or "overwhelmingly"²⁵⁶ better qualified than the person the employer chose for the job. By doing so, these courts have increased the quantum of evidence that a plaintiff must produce to create an inference of discriminatory intent.

This standard is especially troubling on motions for summary judgment. Because the ultimate issue in a disparate treatment case involves the employer's intent, courts should be wary of granting summary judgment in employment discrimination cases.²⁵⁷ Requiring plaintiffs to demonstrate the clear superiority of their qualifications makes it more difficult to survive a motion for summary judgment and deprives plaintiffs of the opportunity to present their case to the ultimate fact finder.²⁵⁸

qualifications between job candidates are generally not probative evidence of discrimination unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.").

255. *E.g.*, *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999) (stating that, when a plaintiff is not "clearly better qualified" than the candidate selected, the employer has discretion to select between the candidates), *cert. denied*, 120 S. Ct. 53 (1999).

256. *E.g.*, *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) ("The disparity in qualifications must be 'overwhelming' to be evidence of pretext." (citations omitted)); *Birge v. Apfel*, No. 97-2158, 1998 U.S. App. LEXIS 6605, at *13 (10th Cir. Apr. 2, 1998) (holding that the plaintiff failed to produce evidence "that she was overwhelmingly better qualified than the other candidates"); *Ning v. Okla. Dep't of Env'tl. Quality*, No. 96-6372, 1997 U.S. App. LEXIS 12615, at *8 (10th Cir. May 30, 1997) ("Absent evidence that one candidate is 'overwhelmingly better qualified,' pretext cannot be shown simply by comparing plaintiff's qualifications with those of the successful applicant." (citation omitted)).

257. See *supra* notes 188-89 and accompanying text.

258. *E.g.*, *Bullington*, 186 F.3d at 1319-22 (affirming an order granting summary judgment for the employer on the plaintiff's disparate treatment claims of sex and age discrimination and noting, in part, that the plaintiff failed to provide evidence that she was "overwhelmingly better qualified" than the candidates selected by the employer); *Simms*, 165 F.3d at 1330-31 (affirming an order granting summary judgment for the employer on the plaintiff's race discrimination claim, noting that the plaintiff "provide[d] no evidence that he was so clearly better qualified than [the candidate selected] that a jury could reasonably conclude that [the employer] based its decision on something other than the proffered reason"); *Birge*, 1998 U.S. App. LEXIS 6605, at *13-15 (affirming an order granting summary judgment for the employer on the plaintiff's sex discrimination claim, in part, because the plaintiff had not "presented evidence that she was overwhelmingly better qualified than the other candidates"); *Harris v. Parker Hanifin Corp.*, No. 1:97-CV-254-B-D, 1998 U.S. Dist. LEXIS 13526, at *8-10 (N.D. Miss. Aug. 24,

Moreover, nothing in the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,²⁵⁹ and refined in *Texas Department of Community Affairs v. Burdine*²⁶⁰ and *St. Mary's Honor Center v. Hicks*,²⁶¹ compels the conclusion that plaintiffs must present evidence of clearly-superior qualifications.²⁶² It would not be inconsistent for a court adhering to the pretext-plus standard, such as the Fifth Circuit, to also adopt a heightened standard for qualifications. Both standards raise the bar for plaintiffs, thus limiting the cases in which plaintiffs can create an actionable claim of discrimination. But, it is unclear why a circuit, like the Tenth, which professes to follow the more lenient "pretext-only" approach,²⁶³ would raise the quantum of proof that a plaintiff must present with regard to her qualifications in order to survive a motion for summary judgment.

Yet, this is exactly what the Tenth Circuit did in *Paulsboe v. Farnam Cos.*²⁶⁴ In that case, Connie Paulsboe, a white woman, sued her employer for sex discrimination stemming from the employer's decision to promote a white man to regional sales manager, a position for which Paulsboe also had applied.²⁶⁵ In reviewing the district court's order granting summary judgment for the employer, the Tenth Circuit noted that "[a] showing of pretext, in itself, is all that is required to raise the inference of discriminatory intent, no additional showing of actual discriminatory animus is necessary."²⁶⁶

1998) (affirming an order granting summary judgment for the employer on a race discrimination claim, noting that the plaintiff's claim that she was better qualified for the position did not establish pretext because she had not produced "sufficient evidence to create a jury issue as to whether she [was] clearly better qualified than [the candidate selected]"); see also *Nichols v. Grocer*, 138 F.3d 563, 568-70 (5th Cir. 1998) (reversing a jury verdict in favor of the plaintiff on a sex discrimination claim, noting, in part, that the plaintiff "failed to show that she was *clearly better qualified* than [the selected candidate] with respect to any of the listed selection criteria" (emphasis in original) (citation omitted)).

259. 411 U.S. 792 (1973).

260. 450 U.S. 248 (1981).

261. 509 U.S. 502 (1993).

262. For a discussion of the Supreme Court's decisions in *McDonnell Douglas* and *Burdine*, see text accompanying notes 129-35 and 142-49. For an analysis of the Supreme Court's decision in *Hicks*, see *infra* text accompanying notes 304-15.

263. See *infra* note 307 and accompanying text.

264. No. 97-7003, 1997 U.S. App. LEXIS 19990 (10th Cir. Aug. 1, 1997).

265. *Id.* at *2-3.

266. *Id.* at *5 (citing *Randle v. City of Aurora*, 69 F.3d 441, 451-52, n.17

Thus, while Paulsboe did not have to satisfy the more rigorous "pretext-plus" standard, she did have to demonstrate that she was overwhelmingly better qualified for the job. "Absent evidence that one candidate is 'overwhelmingly better qualified,' pretext cannot be shown simply by comparing plaintiff's qualifications with those of the successful applicant."²⁶⁷ Because Paulsboe proved unable to produce such evidence, the Tenth Circuit affirmed the district court's order.²⁶⁸

The problem with this requirement is that it is very difficult for plaintiffs to demonstrate that they are more qualified than the candidate selected by the employer.²⁶⁹ Employers normally hire and promote on the basis of multiple criteria. As a result, an employer can always point to at least one criterion, which it claims is critical to the position, on which the plaintiff is weaker than the candidate selected. Requiring plaintiffs to prove clearly-superior qualifications, especially on motions for summary judgment, significantly reduces the number of cases that will proceed to trial. This limits the types of cases in which a finding of employment discrimination occurs, which, in turn, is consistent with the meritocracy myth's central assumption that discrimination in the workplace is a "thing of the past."

E. THE "HONEST BELIEF" STANDARD

As the Supreme Court aptly noted in *United States Postal Service Board of Governors v. Aikens*,²⁷⁰ there "seldom [is] 'eyewitness' testimony as to the employer's mental processes."²⁷¹ The burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*²⁷² exists because plaintiffs often do not have evidence of their employers' subjective beliefs and motivations.²⁷³ Yet, a growing number of federal courts now require plaintiffs not only to prove that the employer's legitimate, nondiscriminatory reason was objectively false, but also that the employer did not

(10th Cir. 1995), which had rejected the pretext-plus approach).

267. *Id.* at *8 (citations omitted).

268. *Id.* at *2.

269. *See supra* text accompanying notes 170-76.

270. 460 U.S. 711 (1983).

271. *Id.* at 716.

272. 411 U.S. 792 (1973).

273. *See supra* notes 133-35 and accompanying text.

honestly believe the reason it proffered for the challenged employment decision.²⁷⁴ This so-called "honest belief" standard has made it virtually impossible for a plaintiff to prevail on an employer's motion for summary judgment absent direct evidence of the employer's discriminatory intent.²⁷⁵ Two cases,

274. See, e.g., *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) ("The relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs."); *Bibbs v. Bd. of Trustees*, No. 98-3029, 1999 U.S. App. LEXIS 18303, at *11 (7th Cir. July 30, 1999) ("Even if [the employer's] belief was wrong, his action was not discriminatory as long as he honestly held that belief." (citations omitted)); *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Once the employer has articulated a non-discriminatory explanation for its action . . . the issue is not 'the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers.'" (citations omitted)); *Mandavilli v. Maldonado*, 38 F. Supp. 2d 180, 200 (D.P.R. 1999) ("When assessing evidence of pretext, the issue is not whether Defendants' asserted reasons are 'real, but merely whether the decisionmakers . . . believed them to be real.'" (citation omitted)); *Byrnie v. Town of Cromwell Pub. Sch.*, 73 F. Supp. 2d 204, 214 (D. Conn. 1999) ("However, even if we were to assume that the Selection Committee misjudged plaintiff's qualifications, this would not preclude summary judgment in this case, for the relevant inquiry in a disparate treatment case is not whether defendants' proffered reasons were wise, or fair, or correct, but whether defendants honestly believed those reasons and acted in good faith upon those beliefs."); *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 399 (S.D.N.Y. 1999) ("A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." (citation omitted)); *Oliver v. United States Dep't of Def.*, 44 F. Supp. 2d 821, 826 (W.D. Tex. 1999) ("The relevant inquiry in any case is not whether the employer's evaluations were wise or correct, but whether they were honestly held and free of discriminatory bias." (citation omitted)); *Bickerstaff v. Nordstrom, Inc.*, 48 F. Supp. 2d 790, 800 (N.D. Ill. 1999) ("If an employee making hiring decisions honestly believes that the decisions are based on nondiscriminatory reasons, the reasons are not pretextual." (citation omitted)).

275. See, e.g., *Bullington*, 186 F.3d at 1308, 1318 (affirming an order granting summary judgment to the employer on the plaintiff's disparate treatment claims of sex and age discrimination and retaliation and noting that "even if we were to assume that United misjudged Ms. Bullington's qualifications, such evidence would not preclude summary judgment in this case" because "[t]he relevant inquiry is not whether United's proffered reasons were wise, fair or correct but whether United honestly believed those reasons"); *Bibbs*, 1999 U.S. App. LEXIS 18303, at *11 ("The relative mediocrity of the 1995 evaluation also indicates that [the plaintiff's supervisor], whether rightly or wrongly, had come to believe that [the plaintiff] was not sufficiently qualified to perform the duties of administrative assistant. Even if [the supervisor's] belief was wrong, his action was not discriminatory as long as he honestly held that belief." (citations omitted)); *Carpenter v. Fed. Nat'l Mortgage Ass'n*, 174 F.3d 231, 234, 237 (D.C. Cir. 1999) (affirming an order granting summary judgment for the employer on the white female plaintiff's retaliation claim and denying remand for discovery,

citing favorably to circuit precedent providing that a court's analysis of pretext "is not [about the] correctness of [the] employer's reasons but whether [the employer] honestly believes them" (citation omitted), *cert. denied*, 120 S. Ct. 184 (1999); *Milton v. Chicago Park Dist.*, No. 97-3166, 1998 U.S. App. LEXIS 17932, at *9-10 (7th Cir. July 29, 1998) (affirming an order granting summary judgment for the employer on a race discrimination claim, explaining that the plaintiff had done "little to convince [the court] that the Park District did not honestly believe in its reason for not re-hiring him"); *Ellis v. Blood Sys., Inc.*, No. 95-2114, 1996 U.S. App. LEXIS 15643, at *12 (7th Cir. June 25, 1996) ("[E]vidence of [the plaintiffs] fine interpersonal skills . . . is insufficient to enable a jury to rationally conclude that [her employer] did not honestly believe that [her] interpersonal skills were not as good as the others."); *Booker v. Dayton Hudson Corp.*, No. 98 C 0737, 1999 U.S. Dist. LEXIS 16241, at *22-23 (N.D. Ill. Oct. 5, 1999) (granting the employer's motion for summary judgment on the plaintiff's sex and pregnancy discrimination claims, noting that "[t]he relevant inquiry is thus not whether plaintiff actually violated company policy, but rather whether the company honestly believed she did"); *Priester v. WMAQ A.M. Radio*, No. 97 C 7959, 1999 U.S. Dist. LEXIS 8322, at *36 (N.D. Ill. May 24, 1999) ("As long as Defendants honestly believed that other candidates were more qualified than Priester for the various full-time openings, Priester cannot establish pretext for either age or race discrimination."); *Cooper v. Diversicare Mgmt. Servs. Co.*, NO. 98-W-194-S, 1999 U.S. Dist. LEXIS 9138, at *26 (M.D. Ala. May 10, 1999) (granting the employer's motion for summary judgment on the plaintiff's race discrimination claim because even if the plaintiff's testimony established that the employer was mistaken when it terminated the plaintiff based on violations of the employer's rules, the plaintiff had failed to offer sufficient evidence that the employer "did not believe plaintiff had committed the charged violations of the employer's rules"); *Buchanan v. Tower Auto., Inc.*, 31 F. Supp. 2d 644, 659 (E.D. Wis. 1999) (granting summary judgment for the employer on the plaintiff's race discrimination claims because "[e]ven assuming, arguendo, that the plaintiffs are correct in their view that they were as qualified as those who were interviewed (or more qualified than one interviewee), such 'evidence' does not go to the question of [the selecting official's] belief that, in her mind, the three candidates that she had selected were the most qualified"), *aff'd*, 1999 U.S. App. LEXIS 26647 (7th Cir. Oct. 20, 1999); *Jennings v. Nat'l R.R. Passenger Corp.*, No. 97 C 6385, 1998 U.S. Dist. LEXIS 12004, at *23 (N.D. Ill. July 30, 1998) ("Regardless of the accuracy of these statements, this evidence does not demonstrate Ziethan did not honestly believe the reasons he gave for selecting Beckett for inventory administrator."); *Hughes v. Ala. Dep't of Pub. Safety*, 994 F. Supp. 1395, 1399-1401 (M.D. Ala. 1998) (granting summary judgment to the employer on the plaintiff's race discrimination claim because even though the plaintiff could present evidence discrediting the statements of two department employees included in a report that formed the basis of the department's challenged employment decisions, the plaintiff could not discredit the department's articulated reason that it honestly had relied on the report in denying the plaintiff a promotion and in demoting him), *aff'd*, 166 F.3d 353 (11th Cir. 1998); *James v. Sheehan [sic]*, No. 95 C 1789, 1997 U.S. Dist. LEXIS 1890, at *7 (N.D. Ill. Feb. 25, 1997) (noting that the court's role, even on motions for summary judgment, is not to evaluate "the wisdom of the [employer's] reason, but the genuineness of the [employer's] motives"), *aff'd*, 137 F.3d 1003 (7th Cir. 1998); *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) ("[The honest belief] rule, as developed in a series of

*Hughes v. Koppers Industries, Inc.*²⁷⁶ and *Bell v. EPA*,²⁷⁷ illustrate how the "honest belief" standard, even in pretext-only circuits,²⁷⁸ transforms the circumstantial evidence case into one requiring direct evidence of discriminatory intent.

In *Hughes*, Cornell Hughes, a black man, filed suit against Koppers Industries, his employer, for failure to promote him to the position of laboratory supervisor at Koppers's chemical plant.²⁷⁹ Koppers selected Gregory Traczek, a white man, for the position.²⁸⁰ Hughes clearly had more experience than did Traczek, both within the industry and with the firm. Hughes had worked in the chemical industry for nineteen years and with Koppers for more than five years.²⁸¹ Traczek, who received the promotion, had only four years of industry experience, all at Koppers.²⁸² Hughes, unlike Traczek, had discharged "all of the functions of supervisor."²⁸³ Hughes also had trained some of his co-workers, including Traczek.²⁸⁴ Koppers claimed that it hired Traczek because he had earned a college degree and because he had good leadership skills, effective oral and written communication skills, and could manage his workload under pressure and work without supervision.²⁸⁵ The trial court granted summary judgment in favor of Koppers and the Seventh Circuit affirmed.²⁸⁶

Although Hughes's qualifications, in terms of industry, firm and supervisory experience, clearly exceeded those of Traczek, Hughes lacked the one objective qualification on which the employer based its decision: a college degree.²⁸⁷ The

Seventh Circuit decisions, provides that so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless.").

276. No. 96-2625, 1997 U.S. App. LEXIS 223 (7th Cir. Jan. 3, 1997).

277. No. 97 C 6349, 1999 U.S. Dist. LEXIS 16445 (N.D. Ill. Oct. 14, 1999).

278. The Northern District of Illinois, which decided *Bell v. EPA*, sits in the Seventh Circuit, a pretext-only circuit. See *infra* note 307.

279. See *Hughes*, 1997 U.S. App. LEXIS 223, at *2-3.

280. *Id.* at *3.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at *7.

286. *Id.* at *1-2.

287. Hughes had majored in chemistry in college for two years, but had not earned his degree. Traczek had earned a degree in biology. *Id.* at *7. The court did not question how a biology degree would benefit a supervisor in a

Seventh Circuit, however, concluded that such large disparities in objective qualifications did not even merit a trial. Instead, the court explained that the issue in the case was "not whether Hughes was more qualified than Traczek, but whether the employer could not have honestly believed that Hughes was less qualified than Traczek."²⁸⁸ In other words, the authenticity of the employer's belief about the legitimate, nondiscriminatory reason, not the objective truth or falsity of the proffered reason, governed the analysis.

The federal district court in *Bell* employed a similar analysis in order to discount substantial evidence that the plaintiffs had objectively superior qualifications to those persons selected by the employer for promotion. In *Bell*, four plaintiffs—Bell and Hill, two black women; Prasinos, a Greek woman; and Assadi, a 50-year-old Iranian man—alleged that the EPA had discriminated against them on the basis of race, national origin, and age, respectively.²⁸⁹ The plaintiffs alleged that the EPA had discriminated in its decision to promote four white employees, instead of the plaintiffs, to four new GS-13 Master positions in the EPA's Air Enforcement Compliance and Assurance division.²⁹⁰ The EPA claimed that it had hired the "most qualified candidates" for the GS-13 positions.²⁹¹

The facts, however, belied that assertion. First, each of the four plaintiffs had worked for the EPA longer than any one of the four white employees selected by the EPA (selected employees).²⁹² Second, all four of the plaintiffs had received EPA service achievement medals. Bell had received three such medals, Assadi and Prasinos had received two medals, and Hill had received one medal.²⁹³ Only one of the four selected employees had received any EPA service achievement

chemical plant. See also *supra* Part II.B. (discussing the erosion of the legitimacy requirement).

288. *Hughes*, 1997 U.S. App. LEXIS 223, at *6 (emphasis added).

289. *Bell v. EPA*, No. 97 C 6349, 1999 U.S. Dist. LEXIS 16445, at *4 (N.D. Ill. Oct. 14, 1999). Plaintiff Hill, an African-American woman, dropped her sex discrimination claim. *Id.* at *9.

290. *Id.* at *4.

291. *Id.* at *10.

292. *Id.* at *13. Assadi had worked for the EPA the longest, having been employed since 1980. *Id.* at *13 n.2. Prasinos and Bell were hired in 1986, whereas Hill was hired in 1987. *Id.* Hamsing and Dart, two of the four selected white employees, began work for the EPA in 1987 and 1990, respectively. *Id.* The other two selected employees, Kieth and Keegan, began work for the EPA in 1991. *Id.*

293. *Id.* at *13.

medals.²⁹⁴ Third, three of the plaintiffs—Assadi, Bell, and Prasinos—had engineering experience with firms outside the EPA, while none of the four selected employees had such experience.²⁹⁵ Fourth, none of the selected employees had experience as an EPA region coordinator, while both Bell and Prasinos had served in such a capacity.²⁹⁶ Fifth, both Bell and Hill had “developed enforcement tools used by Kieth [one of the selected employees], and [had] assisted Kieth in her training.”²⁹⁷ Finally, the preliminary rankings of the four selected employees were comparable to those of the plaintiffs.²⁹⁸

The court, however, made short shrift of plaintiffs’ evidence, noting that their attempt to establish pretext through comparison of objective qualifications was “misplaced.”²⁹⁹ “The court’s inquiry on the pretext issue is not to compare the qualifications of Plaintiffs and Selectees.... The issue is whether the EPA *honestly believed* that it promoted the most qualified persons for the positions....”³⁰⁰ The plaintiffs in *Bell*, however, did not have direct evidence of their employer’s state of mind. As a result, the court granted the EPA’s motion for summary judgment.³⁰¹

As the decisions in *Hughes* and *Bell* illustrate, the “honest belief” standard eviscerates the circumstantial evidence case. Requiring plaintiffs to prove their employer’s state of mind, for example, whether beliefs are honestly held, amounts to a requirement that the plaintiff present direct evidence of discriminatory purpose. How does a plaintiff in a circumstantial evidence case ever prove that the employer did not *honestly* believe its reasons for hiring another candidate? The standard is even more problematic when applied to subjective hiring criteria.³⁰² For example, how does a plaintiff

294. Kieth had received two EPA service achievement medals. *Id.*

295. *Id.* at *14 n.3.

296. *Id.*

297. *Id.*

298. *Id.* at *13. Two of the selected employees—Hamsing and Dart—received a preliminary ranking of 75, as did two of the plaintiffs—Assadi and Prasinos. *Id.* The other two selected employees—Kieth and Keegan—received a preliminary ranking of 69, which Bell also received. *Id.* Hill received a preliminary ranking of 63. *Id.*

299. *See id.* at *14.

300. *Id.* at *14-15 (emphasis added) (citations omitted).

301. *See id.* at *1.

302. *See, e.g., Ellis v. Blood Sys., Inc.*, No. 95-2114, 1996 U.S. App. LEXIS 15643, at *11-12 (7th Cir. June 25, 1996) (“[Plaintiff] concedes that she ‘can

demonstrate that her employer did not honestly believe the candidate selected had superior interpersonal skills?³⁰³ An admission by the employer would suffice, but this constitutes direct evidence. The entire purpose of using circumstantial evidence is to allow plaintiffs to demonstrate by inference, rather than by direct proof, the employer's bad intent. The "honest belief" standard requires the plaintiff to crawl inside the employer's head in order to produce evidence of discriminatory intent. By forcing plaintiffs to provide such evidence at the summary judgment stage, the federal courts employing the "honest belief" standard effectively ensure that few employment discrimination plaintiffs will ever have their day in court.

F. THE PRETEXT-PLUS PROBLEM

Since the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,³⁰⁴ a split has existed in the federal circuits³⁰⁵ about the quantum of proof necessary for a plaintiff to prevail on the merits in a case involving only circumstantial evidence of employment discrimination. The Court's ambiguous decision in *Hicks*³⁰⁶ paved the way for several circuits to adopt the

not present direct evidence relating to how well the other candidates performed in their interviews." (citation omitted)).

303. See *id.* at *12 ("[E]vidence of [plaintiff's] fine interpersonal skills . . . is insufficient to enable a jury to rationally conclude that [her employer] did not honestly believe that [her] interpersonal skills were not as good as the others." (citation omitted)).

304. 509 U.S. 502 (1993).

305. See generally *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2104-05 (2000) (O'Connor, J.) (noting, in a unanimous decision, that the Court had granted certiorari to resolve a split in the circuits about whether a plaintiff could prevail on the merits in an employment discrimination case by only presenting evidence of a prima facie case of discrimination coupled with sufficient evidence of pretext).

306. In *Hicks*, the Supreme Court, in a 5-4 decision, held that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. But, as Justice Souter noted in his dissent, the Court's decision in *Hicks* sent "conflicting signals." *Id.* at 535 (Souter, J., dissenting). In a dissent joined by Justices White, Blackmun, and Stevens, Justice Souter explained that the majority's opinion in *Hicks* "support[ed] a more extreme conclusion, that proof of the falsity of the employer's articulated reasons [would] not even be sufficient to sustain a judgment for the plaintiff." *Id.* As a result, in the wake of *Hicks*, some circuits interpreted the Court's decision as requiring evidence of more than pretext in order for an employment discrimination plaintiff to prevail on the merits in a circumstantial evidence

heightened pretext-plus approach, which required plaintiffs not only to demonstrate that their employers' legitimate, nondiscriminatory reason was unworthy of credence or a pretext, but also to show that discrimination was the real reason for the challenged employment decision.³⁰⁷ By applying

case. This created a split in the circuits, which the Supreme Court recently resolved in *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000).

307. The First, Second, Fourth, and Fifth Circuits applied a pretext-plus standard, even at the summary judgment stage. See, e.g., *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 22 n.5 (1st Cir. 1999) ("In *Hicks*, the Court made it clear that in order to survive summary judgment, a Title VII plaintiff must present sufficient evidence not only that the employer's proffered reason is false but also that the real reason is discrimination." (citation omitted)); *Florence v. United States Vanadium Corp.*, No. 97-7443, 1998 U.S. App. LEXIS 22579, at *6 (2d Cir. Feb. 5, 1998) (stating that to survive an employer's motion for summary judgment plaintiff must show that the employer's legitimate, nondiscriminatory reason is false and a pretext for discrimination); *Gillins v. Berkeley Elec. Coop.*, 148 F.3d 413, 416 (4th Cir. 1998) ("This court has adopted what is best described as the 'pretext-plus' standard for summary judgment in employment discrimination cases." (citation omitted)); *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 141 (5th Cir. 1996) (stating that to avoid summary judgment the plaintiff must refute the employer's legitimate, nondiscriminatory reasons and "create[] a reasonable inference that race was a determinative factor" in the challenged employment decision).

The remaining circuits did not *require* plaintiffs to demonstrate both that the employer's legitimate, nondiscriminatory reason was a pretext and that the real reason for the challenged employment decision was discrimination in order to survive an employer motion for summary judgment. See, e.g., *Aka v. Wash. Hosp. Ctr.*, 156 F. 3d 1284, 1290 (D.C. Cir. 1998) (en banc) (rejecting "any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment"); *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 495 (3d Cir. 1995) ("[I]n *Fuentes v. Perskie*, 32 F. 3d 759 (3d Cir. 1994), we joined those of our sister circuits who have read *Hicks* to require at summary judgment 'pretext-only.'"); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 835 (6th Cir. 1997) (stating that the U.S. Supreme Court rejected the "pretext-plus" standard in *Hicks*); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 458 (7th Cir. 1999) ("[T]o prevail on a defendant's motion for summary judgment, [a plaintiff] need not show 'pretext-plus'"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994) (stating that an appellate court cannot reverse a jury verdict for plaintiff "if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions" (citation omitted)), *reh'g denied*, 1994 U.S. App. LEXIS 8280 (8th Cir. 1994), *cert. denied*, 513 U.S. 946 (1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[T]he factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more"); *Paulsboe v. Farnam Cos.*, No. 97-7003, 1997 U.S. App. LEXIS 19990, at *5 (10th Cir. Aug. 1, 1997) ("A showing of pretext, in itself, is all that is required to raise the inference of discriminatory intent, no additional showing of actual

the pretext-plus approach at the summary judgment stage,³⁰⁸ these circuits made it virtually impossible for plaintiffs without direct evidence of discrimination to survive employer motions for summary judgment.³⁰⁹ The pretext-plus approach

discriminatory animus is necessary." (citation omitted)); *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1441 (11th Cir. 1998) (holding that an offer of sufficient evidence so that the finder of fact disbelieves the employer's legitimate, nondiscriminatory reason suffices to prevent entry of summary judgment in an age discrimination case).

308. See *supra* note 307.

309. See, e.g., *Rodriguez-Cuervos*, 181 F.3d at 22 (affirming an order granting summary judgment to the employer on the plaintiff's race and national origin claims even though the plaintiff presented evidence that the reasons offered for his demotion "may have been inaccurate" and that the employer may have treated plaintiff differently than other Wal-Mart managers because the plaintiff had failed to offer evidence that Wal-Mart's actions were "predicated on the basis of race or national origin" (footnote omitted)); *Gillins v. Berkeley Elec. Coop.*, 148 F.3d 413, 416 (4th Cir. 1998) (affirming an order granting summary judgment for the employer even though Gillins demonstrated that his employer's legitimate, nondiscriminatory reason for temporarily demoting him—a hiring freeze—was "unpersuasive, or even obviously contrived" because Gillins had not offered evidence that race discrimination actually motivated the employer's decision (citation omitted)); *Florence v. United States Vanadium Corp.*, No. 97-7443, 1998 U.S. App. LEXIS 22579, at *8 (2d Cir. Feb. 5, 1998) (affirming an order by the trial court granting summary judgment in favor of the employer on a race discrimination claim, noting that the employer is not subject to liability under Title VII for "misjudg[ing] the relative qualifications" of job candidates, so long as employer's judgment is exercised "on a nondiscriminatory basis"); *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137 (5th Cir. 1996) (noting the absence of overt statements on the part of the decision maker and upholding an order granting summary judgment for the employer on a race discrimination claim, even though (1) the white woman selected for the position was later determined to lack minimum educational qualifications for the position, and (2) the plaintiff had previously won a race discrimination case involving the promotion of the white man in charge of selecting candidates for the position involved in the instant lawsuit); *Stanley v. Widnall*, No. 95-1206, 1995 U.S. App. LEXIS 34727, at *13-16 (4th Cir. Dec. 11, 1995) (per curiam) (affirming an order granting summary judgment for the employer on the black male plaintiff's race discrimination claim for failure to promote the plaintiff to one of two Construction Representative (CR) jobs, even though (1) the plaintiff ranked second on employer's internally generated list of qualified candidates, (2) the plaintiff had received better performance evaluations than one of two white male candidates promoted to a CR position, and (3) the hiring official had selected no black applicants for any of the six CR positions that had become available over time, because the plaintiff's "evidence [did not] suggest[] racial discrimination"); cf. *Fisher v. Vassar College*, 114 F.3d 1332, 1334 (2d Cir. 1997) (en banc) (reversing the trial court's finding of an Equal Pay Act violation and discrimination based on marital status and age, notwithstanding a "sustainable finding of pretext" because the facts did not support a finding of intentional discrimination), *cert. denied*, 522 U.S. 1075 (1998).

essentially transformed the circumstantial evidence case into one requiring direct evidence of discrimination.

Recently, in *Reeves v. Sanderson Plumbing Products, Inc.*,³¹⁰ the Supreme Court clarified its earlier decision in *Hicks*. The *Reeves* case began in 1996, when Roger Reeves filed suit in federal district court in Mississippi, claiming that his employer had fired him because of his age.³¹¹ A jury found in Reeves's favor, concluding that his employer had engaged in "willful" age discrimination.³¹² The Fifth Circuit, which had adopted the pretext-plus standard, reversed the jury verdict, concluding that although Reeves may have presented evidence sufficient to demonstrate pretext, he had failed to show that age discrimination had motivated the employer to terminate him.³¹³ In a unanimous decision, the Supreme Court reversed, concluding that the Fifth Circuit had "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence."³¹⁴ The Court explained that in *Hicks* it had held that while the prima facie case when coupled with evidence of pretext does not *compel* a finding of intentional discrimination for the plaintiff, neither does it preclude such a finding.³¹⁵ In other words, the pretext-plus circuits had misinterpreted *Hicks* by requiring plaintiffs, in all cases, to provide evidence that not only was the employer's legitimate, nondiscriminatory reason unworthy of

In his dissent in *St. Mary's Honor Center v. Hicks*, Justice Souter predicted that the "pretext-plus" approach would . . . result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." 509 U.S. 502, 535-36 (Souter, J., dissenting) (citations omitted).

310. 120 S. Ct. 2097 (2000).

311. *Id.* at 2103.

312. *Id.* at 2104.

313. See *id.*; see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 693-94 (5th Cir. 1999) (reversing a jury verdict for Reeves and concluding that even though Chestnut, one of three supervisors recommending Reeves's termination, had made "age-related comments" of a "damning nature," a jury could not find that Sanderson had terminated Reeves because of his age because Chestnut's comments were made several months before his dismissal, Chestnut was only one of three supervisors recommending Reeves's termination, two of the supervisors involved in the decision to dismiss Reeves were over the age of fifty, and twenty managers at the firm were over the age of fifty).

314. *Reeves*, 120 S. Ct. at 2108.

315. *Id.* at 2108-10.

credence, but also that discrimination actually had motivated the challenged employment action.

The Supreme Court's rejection of the pretext-plus approach *may* make it more difficult for employers to prevail on motions for summary judgment in those circuits that previously adhered to the pretext-plus standard.³¹⁶ But it is unlikely that *Reeves* will significantly affect the alarming rate at which the federal courts grant employer motions for summary judgment in circumstantial evidence cases. *Reeves* will do so only if two assumptions are true: first, the majority of cases in which plaintiffs lost on employers' motions for summary judgment occurred in circuits adhering to the pretext-plus approach; and, second, the former pretext-plus courts do not adopt other devices to achieve the same result they reached previously under the pretext-plus approach. Neither assumption is warranted.

First, a majority of circuits never followed the mandatory pretext-plus approach rejected by the Supreme Court in *Reeves*.³¹⁷ While the pretext-plus circuits certainly contribute to the alarming rate at which the federal courts grant employer motions for summary judgment and judgment as a matter of law in circumstantial evidence cases, they only account for one-third of the cases in which employers prevail on these motions.³¹⁸ Thus, it is not simply plaintiffs in pretext-plus

316. Some attorneys and academics have hailed *Reeves* as a victory for employment discrimination plaintiffs, concluding that fewer employers will file or prevail on motions for summary judgment. See, e.g., Marcia Coyle, *Dismissal of Bias Suits Harder: New High Court Bias Ruling May Spark More Jury Trials, Settlements*, NAT'L L.J., June 26, 2000, at B1 (quoting Paul Mollica, a labor attorney, as saying that *Reeves* "should discourage companies from filing 'groundless' summary judgment motions"); Tony Mauro, *Employees Who Sue to Get a Break: O'Connor Spurns 'Pretext-Plus'*, LEGAL TIMES, June 19, 2000, at 8 (quoting University of Washington law professor Eric Schnapper as saying "[a] lot more cases will get to a jury" because of *Reeves*). Others view *Reeves* as a "one-two punch to employers." Judy Greenwald, *Litigation May Surge for Age Bias claims*, BUS. INS., June 19, 2000, at 1 (quoting Susan Mahallati Kysela, attorney for the National Chamber Litigation Center: "[*Reeves*] makes it easier for employees to win discrimination cases against their employers, or at least get their claims in front of a jury.").

317. See *supra* note 307.

318. Of the 197 cases in which the federal courts granted employers' motions for summary judgment (in part or in full) or judgment as a matter of law, or reversed jury verdicts in favor of plaintiffs on plaintiffs' race, sex, race and sex, or retaliation claims (summary judgment cases), 69 (35%) were decided in pretext-plus circuits. Assuming—and this is a *big* assumption—that the courts in pretext-plus circuits would *not* have granted an employer's motion for summary judgment or judgment as a matter of law, or reversed a

circuits that face substantial obstacles at the summary judgment stage. In fact, a number of circuits that have rejected pretext-plus employ other devices that make it much easier for employers to prevail on summary judgment motions. The Seventh Circuit, for example, has adopted the "honest belief" standard, which transforms the circumstantial evidence case into a direct evidence case, much in the same way that the pretext-plus approach did.³¹⁹ The Tenth Circuit requires plaintiffs, even at the summary judgment stage, to provide evidence that they are "clearly" or "overwhelmingly" better qualified³²⁰ than the candidate selected by the employer. This is a standard few employment discrimination plaintiffs can satisfy, unless employers hire on the basis of only one objective qualification.³²¹ And, courts in several circuits that did not adopt the mandatory pretext-plus standard have redefined issues of fact as issues of law, thus making it easier for employers to prevail on motions for summary judgment.³²² Although *Reeves* removes a convenient tool from the hands of judges deciding summary judgment motions, it has no effect on

plaintiff's jury verdict had they been unable to avail themselves of the pretext-plus analysis, plaintiffs still would have lost on these motions almost 50% of the time. (197 "summary judgment" cases minus the 69 cases in pretext-plus circuits leaves 128 cases of the 258 in the pool, or 49.6%.) See *supra* notes 12 and 140. This still is a very high rate of summary judgment, given the fact that circumstantial evidence cases essentially involve questions of intent—a fact-based inquiry. See *supra* notes 188-89 and accompanying text.

319. See *supra* Part II.E.

320. See *supra* Part II.D.

321. See *supra* text accompanying notes 169-76.

322. See, e.g., *Gartman v. Gencorp Inc.*, 120 F.3d 127, 129, 131 (8th Cir. 1997) (reversing the trial court's denial of the employer's motion for judgment as a matter of law on the plaintiff's sex discrimination claim, concluding that the division president's comment that the plaintiff did not know "how to belly up to the bar" was not a gender-based remark and that the division vice president's comment "S—t, another gal" in response to firm's naming a woman to monitor supplier quality was not relevant because it was made several months before the adverse employment action); *Paulsboe v. Farnam Cos.*, No. 97-7003, 1997 U.S. App. LEXIS 19990, at *8-9 (10th Cir. Aug. 1, 1997) (concluding that a supervisor's concern about the plaintiff's unwillingness to drink and socialize with clients, which the supervisor described "as being 'one of the guys,'" was not a gender-based comment); *Malone v. K-Mart Corp.*, 51 F. Supp. 2d 1287, 1307-08, n.13 (M.D. Ala. 1999) (granting summary judgment on a retaliation claim, in part, because the plaintiff's poor performance evaluations, which she alleged were in retaliation for her race and sex discrimination complaints, occurred 10 months after plaintiff's EEOC charge and, hence, "were 'not temporally close enough to support an inference of causal connection.'" (citation omitted)); see also *supra* text accompanying notes 195-210.

the "honest belief" analysis, the "overwhelmingly better qualified" standard, or the tendency of some federal courts to improperly characterize questions of fact as questions of law. Thus, *Reeves* does not affect plaintiffs' chances for surviving summary judgment in the non-pretext-plus circuits.

Second, neither the Fourth nor the Fifth Circuit, both former pretext-plus circuits, relied exclusively on pretext-plus when granting employers' motions for summary judgment. They also made improper fact determinations,³²³ required plaintiffs to demonstrate that they were "clearly better qualified" than the candidate selected,³²⁴ invoked the "same

323. See, e.g., *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (affirming the trial court's entry of judgment as a matter of law on the plaintiff's sex discrimination claim for failure to send her to the Police Academy, and concluding that plaintiff could not use a mixed-motive analysis because a statement by the plaintiff's supervisor, the Chief of the University police, that "he was never going to send a female to the [Police] Academy" was made "in response to [another officer's] question as to whether [the plaintiff] would be joining him in attending the Police Academy" and, thus, did not "bear directly on the contested employment decision" (citations omitted)); *EEOC v. MCI Telecomms., Inc.*, No. 98-1195, 1999 U.S. App. LEXIS 17847, at *9-10 (4th Cir. July 28, 1999) (affirming an order granting summary judgment in favor of the employer on the EEOC's claim of race and national origin discrimination and noting that the employer's statement that "he sought the most qualified candidates" and his subsequent statement that he hired one candidate "for his junior status and low billing rate" did not "rise[] to the level of mendacity"); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 330 (5th Cir. 1998) (affirming an order granting summary judgment for the employer on the plaintiff's race discrimination claim because "there was no evidence of a causal connection" between a supervisor's racist comment and the employer's failure to promote the plaintiff, even though the supervisor had been disciplined for the comment and the employer based its promotion decision on the supervisor's annual evaluation of the plaintiff's performance), *cert. denied*, 526 U.S. 1051 (1999); *Wright v. Tultex Corp.*, No. 97-0060-D, 1998 U.S. Dist. LEXIS 20383, at *12-15 (W.D. Va. Dec. 14, 1998) (granting judgment as a matter of law in favor of the employer on the plaintiff's sex discrimination claim after declaring a mistrial, and accepting the employer's evidence at trial that the male candidate selected had a "clearly better organized" mock sales presentation, and dismissing the plaintiff's evidence that the male candidate had no college degree while she held an associate's degree by crediting the employer's explanation that "college degree required" meant a four-year degree, not an associate's degree).

324. See, e.g., *Harris v. Parker Hannifin Corp.*, No. 1:97-CV-254-B-D, 1998 U.S. Dist. LEXIS 13526, at *7 (N.D. Miss. Aug. 19, 1998) ("Where the employer's articulated reason for its action is based upon the judgment of the employer as to the qualifications of various applicants or employees, the plaintiff can create a genuine issue of pretext only by showing that she is clearly better qualified than the person who was hired or retained in the position." (citation omitted)); see also *Nichols v. Grocer*, 138 F.3d 563, 568 (5th Cir. 1998) (in reversing the trial court verdict for the plaintiff on her sex

actor" inference,³²⁵ increased the plaintiff's burden in making out a *prima facie* case of discrimination,³²⁶ and required

discrimination claim, the court "note[d] that [the plaintiff had] failed to show that she was *clearly better qualified* than [the candidate selected] with respect to any of the listed selection criteria" (emphasis in original) (citation omitted)).

325. Some courts infer, or even presume, that no discrimination exists when the individual who made the challenged termination or, in some cases, promotion decision originally had hired the plaintiff whose complaint of employment discrimination is before the court. Both the Fourth and Fifth Circuits employ the "same actor" inference. See, e.g., *Islar v. Ourisman Chevrolet Co.*, No. 97-2641, No. 98-1185, 1999 U.S. App. LEXIS 538, at *6 (4th Cir. Jan. 15, 1999) (affirming an order granting summary judgment on the black male plaintiffs' Section 1981 race discrimination claims for failure to promote, crediting the employer's explanation that it had relied on the recommendation of the plaintiffs' supervisor, who had hired the plaintiffs); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 330 n.3 (5th Cir. 1998) (affirming an order granting summary judgment in favor of the employer on the black male plaintiffs' Title VII race discrimination claim and noting that its "disposal of the [plaintiffs' claims on other grounds] foreclose[d] the necessity of a second analysis of the case under the 'same actor' inference" previously adopted by the Fifth Circuit (citation omitted)), *cert. denied*, 526 U.S. 1051 (1999). For a summary of circuits that use the "same actor" inference, see *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1442-43 (11th Cir. 1998). The Eleventh Circuit has declined to adopt the "same actor" inference, concluding that "it is the province of the jury rather than the court . . . to determine whether the inference generated by 'same actor' evidence is strong enough to outweigh a plaintiff's evidence of pretext." *Id.* at 1443 (footnote omitted).

For a critique of the "same actor" inference as applied to the promotion context, see *Taylor*, 193 F.3d at 246-47 (Murnaghan, J., dissenting) (opining that the "same actor" inference should not apply with equal vigor to promotion decisions because "[t]he thought of an employer hiring an individual in a protected class and, for discriminatory reasons, keeping that person in an entry-level station, i.e., hindering the employee from advancing to the ranks of management or into a higher paying position, is not nearly as incredulous as the majority urges"). See generally *supra* text accompanying notes 88-128 for a discussion of evaluation bias, which can affect decisions to promote blacks and women.

326. See *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999). In *Brinkley*, the Fourth Circuit affirmed the trial court's order granting summary judgment in favor of the employer country club, agreeing that the plaintiff had failed to make out a *prima facie* case of sex discrimination based on the employer's demotion and termination of plaintiff as general manager. See *id.* at 616-17. Crediting the employer's deposition testimony, the Fourth Circuit explained that the plaintiff had not satisfied the third element of the *prima facie* case because she had not been performing satisfactorily prior to her termination, in large part because she had proved unable to "form a cohesive management team." *Id.* at 609-10. The court also noted that the plaintiff had not satisfied the fourth element of the *prima facie* case because she and her replacement were not similarly qualified; her replacement had substantially more experience in managing country clubs. *Id.* at 610.

The problem with the Fourth Circuit's analysis is that it improperly increases the plaintiff's burden at the *prima facie* stage of the circumstantial

plaintiffs to provide *substantial* evidence of pretext,³²⁷ all in aid of granting employers' motions for summary judgment or

evidence case. First, the plaintiff offered evidence that part of her problems in building a cohesive management team stemmed from sex discrimination. One member of her team, the greens superintendent, informed the employer that "he wasn't sure he could work for a woman." *Id.* at 604. If sex or race discrimination affects an employee's performance evaluation, which subsequently leads to that employee's termination, the circumstantial evidence case is worthless if the employer merely needs to put forward questionable performance evaluations to completely discredit plaintiff's *prima facie* case. The court would never get to the ultimate issue: Did sex or race discrimination improperly influence the performance reviews, thus paving the way for the plaintiff's termination? *See supra* text accompanying notes 88-128 (discussing the impact of sex and race discrimination on the evaluation of blacks and women).

Second, even assuming that the replacement's superior qualifications are relevant in the termination context, it is the employer's burden to produce those qualifications as its legitimate, nondiscriminatory reason. The plaintiff/employee then has the opportunity to argue pretext. *See Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1316 n.11 (10th Cir. 1999) (stating that allowing the employer to challenge the plaintiff's *prima facie* case by challenging the sufficiency of the plaintiff's qualifications, once the plaintiff establishes she is minimally qualified for position, improperly "short circuit[s] the *McDonnell Douglas* framework" and restricts the court's ability to evaluate the plaintiff's evidence of pretext (citation omitted)); *Walker v. Mortham*, 158 F.3d 1177, 1183-94 (11th Cir. 1998) (concluding that Eleventh Circuit precedent does not require a plaintiff to provide evidence that she is equally or better qualified than the candidate selected as part of her *prima facie* case), *reh'g en banc, denied*, 167 F.3d 542 (11th Cir. 1998), *cert. denied*, 120 S. Ct. 39 (1999).

327. *E.g., Boyd*, 158 F.3d at 329 (stating that because the plaintiff "focused solely on proving pretext" his case fell "within the Rhodes subcategory of cases where '[a] jury may be able to infer discriminatory intent . . . solely from substantial evidence that the employer's proffered reasons are false'" (emphasis added) (citation omitted)); *Nichols v. Grocer*, 138 F.3d 563, 566 (5th Cir. 1998) (noting that in order "for a plaintiff to successfully bootstrap himself into a finding of intentional discrimination [with evidence of pretext alone], the evidence offered to counter the employer's proffered reasons must be *substantial*" (citation omitted)); *cf. Alvarez v. Motorola, Inc.*, No. 97-17214, 1999 U.S. App. LEXIS 2071, at *4 (9th Cir. Feb. 9, 1999) (stating that a plaintiff can survive an employer's motion for summary judgment in a direct evidence case "even if the evidence is not substantial," but must present "specific" and "substantial" evidence of pretext in order to prevail on an employer's motion for summary judgment in a circumstantial evidence case (citations omitted)).

Reeves now precludes federal courts from requiring a plaintiff to demonstrate more than pretext in order to prevail against her employer, but it says nothing about the substantial evidence requirement. Thus, federal courts can continue to use the substantial evidence test at the summary judgment stage, thereby increasing the plaintiff's burden beyond that contemplated by the *McDonnell Douglas* framework. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109 (2000) (stating that a trier of fact could find that the employer had engaged in unlawful discrimination on the basis of the

judgment as a matter of law. And, in retaliation cases, the Fifth Circuit's requirement that plaintiffs demonstrate that the retaliatory conduct involve "ultimate employment decisions"³²⁸ operates in a manner similar to the pretext-plus standard by making it impossible for plaintiffs complaining of a wide range of potentially retaliatory behavior—including disciplinary action,³²⁹ supervisory reprimands,³³⁰ poor performance reviews,³³¹ and even failure to be considered for promotion³³²—to survive employers' motions for summary judgment. Thus, even with the demise of the pretext-plus standard, courts prone to dismiss circumstantial evidence cases at the summary judgment stage have other tools available for doing so.

Finally, the interpretation given to the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*³³³ by the former pretext-plus circuits indicates that these courts adhere to the meritocracy myth's traditional concept of discrimination.³³⁴ *Hicks* was an ambiguous decision, susceptible to two interpretations.³³⁵ The former pretext-plus circuits could have read *Hicks* as permitting judgment for the employer in some cases in which the plaintiff makes out a prima facie case of discrimination and presents some evidence of pretext.³³⁶

plaintiffs' prima facie case coupled with sufficient evidence of pretext).

328. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-10 (5th Cir. 1997), cert. denied, 522 U.S. 932 (1997); see *supra* note 194.

329. *Mattern*, 104 F.3d at 708 (holding that "disciplinary filings" do not constitute an adverse employment action, which is a necessary element of a Title VII retaliation claim).

330. *Id.* (holding that a "supervisor's reprimands" do not constitute an adverse employment action, which is a necessary element of a Title VII retaliation claim); *Wakefield v. State Farm Ins. Co.*, 75 F. Supp. 2d 545, 549 (N.D. Tex. 1999) (noting that an "employer's monitoring of a [sic] employee and criticism of his work does [sic] not rise to the level of an ultimate employment decision" (citation omitted)).

331. *Wakefield*, 75 F. Supp. 2d at 549 (observing that poor performance evaluations do not constitute ultimate employment decision).

332. *Id.* (holding that the failure of an employer to consider an employee for promotion is not an ultimate employment decision, particularly when promotion involves a lateral transfer without a change in compensation or benefits).

333. 509 U.S. 502 (1993).

334. See *supra* Part I.B.

335. See *supra* note 306 and accompanying text.

336. See *Hicks*, 509 U.S. at 511 (holding that evidence that the employer's reasons are a pretext when coupled with the elements of the prima facie case permits, but does not compel, judgment for the plaintiff); see also *Reeves*, 120 S. Ct. at 2109 (holding that the plaintiff's prima facie case coupled with sufficient evidence of pretext "may permit the trier of fact to conclude that the

Instead, these circuits read *Hicks* as mandating judgment for the employer in all cases, even at the summary judgment stage, unless the plaintiff provided the equivalent of direct evidence of discrimination.³³⁷ This insistence on direct evidence of discrimination, even in circumstantial evidence cases, reveals a belief that only claims of overt, conscious, and negative bias trigger the protections of employment discrimination law. *Reeves* does little to alter this misguided conception of discrimination; it merely precludes the federal courts from using one of many tools available—the pretext-plus standard—as a way to achieve results consistent with the meritocracy myth’s assumptions about employment discrimination.³³⁸

CONCLUSION

As the number of Americans who adhere to overtly racist and sexist beliefs declines, expressions of traditional forms of prejudice have become increasingly rare. Yet discrimination in employment based on race and sex has not disappeared; it has merely changed form. A growing body of research reveals that discrimination in today’s market does not look like our traditional notions of bias and often does not manifest itself in overt ways. Instead, modern racism and sexism is difficult to identify, because of the culture’s dominant focus on discrimination as overt and negative bias.

The federal courts could play an important role in reshaping the field of discrimination law by adapting the flexible *McDonnell Douglas* framework for circumstantial evidence cases to account for the modern ways in which discrimination operates in today’s workplace. Instead, many federal courts have transformed the circumstantial evidence case into a “toothless tiger.” By erecting numerous hurdles for plaintiffs to clear at the summary judgment stage, many federal courts make it much easier for employers to prevail on motions for summary judgment.

employer unlawfully discriminated [but t]his is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury’s finding of liability” (emphasis in original)).

337. See *supra* text accompanying notes 307-09.

338. Courts in both the former pretext-only and pretext-plus circuits have used many other devices besides pretext-plus to assist them in granting employers’ motions for summary judgment. See *supra* text accompanying notes 317-32.

Unfortunately, while the need for oversight is great, especially given the subtle ways in which modern discrimination operates, the federal courts increasingly are abdicating their responsibility to ensure that employment practices are truly fair. This merely reinforces the dominant mythology that employment practices are merit driven, and race and gender neutral. Moreover, with the mounting attacks on affirmative action and the federal courts' increased reluctance to look beyond the surface of challenged employment decisions, the avenues available to blacks and women for obtaining redress for modern employment discrimination are rapidly shrinking.